(27,062)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

No. 976.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

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1 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Complaint.

William Langer, Attorney General, Attorney for Plaintiff.
Frank E. Packard, Counsel for Plaintiff.

2 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Complaint.

The State of North Dakota, upon the relation of William Langer, Attorney General, alleges and shows to the court:

I.

The relator, William Langer, is now and has been for more than two years last past, the duly elected, qualified and acting Attorney General of the State of North Dakota.

II.

Defendant is and for many years last past has been a railroad corporation, created and existing under and by virtue of the laws
3 of the state of Wisconsin, and is a citizen and resident of said state; that for many years last past it has owned and operated a system of railroad lines (with branches) having their eastern termini at Ashley, Wisconsin and St. Paul and Minneapolis, Minnesota, and extending westerly from said termini through the states of Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington, and Oregon to Puget Sound and Pacific coast ports; that defendant's lines of railroad extend through or into each of the counties of Barnes, Benson, Billings, Burleigh, Cass, Dickey, Dunn, Eddy, Emmons,

Foster, Golden Valley, Grand Forks, Grant, Griggs, Hettinger, Kidder, La Moure, Logan, McLean, Mercer, Morton, Oliver, Pembina, Ransom, Richland, Sargent, Sheridan, Sioux, Stark, Stutsman, Walsh and Wells, in the State of North Dakota, and during all of the time aforesaid defendant has been engaged in the transportation of commerce, both state and interstate, and its through lines have been and now are instrumentalities of interstate commerce.

III.

Defendant, Walker D. Hines, is now and has been for some time last past, the duly appointed, qualified and acting Director General of the railroad administration of the United States; that by virtue of an act of Congress of August 29th, 1916 (a so-called "rider" attached to the army appropriation bill of that year), and by the provisions of an act of Congress of March 21st, known as the "Federal Rail Control Act," and by virtue of a proclamation of the President of the United States of December 26th, 1917, said Walker D.
4 Hines, and his predecessor in office, Wm. G. McAdoo, are now, and have been since the first day of January, 1918, in possession and control of all the property of said railroad companies and have controlled, operated and supervised the railroad systems of the United States and have performed the duties imposed upon them by said acts of Congress and said proclamation of the President of the United States; that said William G. McAdoo and Walker D. Hines have exercised such possession and control through this defendant railroad company and its officers and directors, and said Walker D. Hines is now in possession and control thereof, exercising his power of supervision and control over the said company and its officials and directors, over the intrastate as well as the interstate business of said company in the State of North Dakota.

IV.

By an act approved March 6th, 1885, a board known as the "Board of Railroad Commissioners" was created by the legislative assembly of Dakota territory. Upon the adoption by the state of a constitution in 1889, Section 82 provided for the election of three commissioners of railroads who should maintain offices at the seat of government and whose term of office should be two years. The powers and duties of the Board of Railroad Commissioners was defined by the act of March 6th, 1885, and have since been amplified from time to time, both by the territorial and state legislative assemblies, up to and including the 1919 assembly. For nearly thirty-four years it
5 has exercised supervision and control over the systems of railroads operating lines in, into and and through the state of North Dakota, both as to intrastate rates and service.

Article 21 and other provisions contained in the Revised Code of North Dakota for 1913 defines the powers and duties of the Board of Railroad Commissioners pertaining to the regulations of common carriers. Sections 4725 provides that no railroad corporation may

change its fares, rates and charges for services without first filing such schedule of fares, rates and charges with the Board of Railroad Commissioners; that at the present time and continuously since March 6th, 1885, the said Board of Railroad Commissioners has exercised supervision and control over the railroads operating within the state of North Dakota in compliance with the powers conferred upon them by said Article and Section and other acts of the legislative assembly, and have required said companies to file schedule of fares, rates and charges at their offices in the state capitol at Bismarck before such rates and charges became effective.

V.

In compliance with the provisions of law set forth in Paragraph IV herein, the defendant railroad company had therefore filed a schedule of fares, rates and charges and said schedule of said defendant railroad company was on file with said Board on May 26th, 1918; there has been no petition or complaint filed with said Board of Railroad Commissioners since said date by said company, asking for an increase in either freight rates or passenger fares and
6 charges within the State of North Dakota.

VI.

On May 25th, 1918, Wm. G. McAdoo, Director General of the United States Railroad Administration, issued General Order No. 28, whereby he directed the railroads of the United States to put into force and effect on June 25th, 1918, certain passenger fares and baggage charges, and on June 10th, 1918, certain freight rates; said passenger and freight charges and rates were greatly in excess of the rates then prevailing in the State of North Dakota, being not less than an increase of 25% in freight rates and an increase of from two and one-half cents to three cents per mile, for passenger fares; such fares, rates and charges were put into effect on the dates above named without first filing with the Board of Railroad Commissioners, as provided by Section 4725 of the Revised Code of 1913, ten days in advance thereto, a schedule of such fares, rates and charges; that such Schedule of fares, rates and charges has been filed with the Board of Railroad Commissioners as a matter of courtesy for the use and information of said Board and not in compliance with said Section 4725; said General Order No. 28 and the exhibit attached thereto is hereby attached as Exhibit A and is a part of this complaint.

VII.

That said order of May 25th, 1918, of said Wm. G. McAdoo, which put into full force and effect in the state of North Dakota, on the 10th and 25th days of June respectively, the schedule of rates and charges therein contained, was unauthorized by and contrary
7 to the acts of Congress of August, 29th, 1916, and March 21st, 1918, and the proclamation of the President of the

United States of December 26th, 1917; that none of said rates prescribed in said order affected the government transportation of troops, war materials or government supplies, nor did they affect the issue of stocks and bonds by defendant railroad company and in no way affected the government of the United States in the prosecution of the present war.

That said Director General of the United States Railroad Administration and the defendant company assumed to act under and by virtue of said acts of Congress giving authority to the President of the United States to take possession and assume control and operation of the railroad systems of the United States; that said act does not authorize the defendants or any federal authority whatsoever, either to initiate or put into effect rates or charges or any other kind of rates or charges for service by said railroad company in the state of North Dakota, other than those filed with the Board of Railroad Commissioners of said state; that said rates and charges contained in said schedule are founded upon a misconstruction of the powers of the Postmaster General as delegated by said acts of Congress.

VIII.

Each and all of the said charges contained in said schedule are unreasonable and excessive and do not serve any useful purpose. On the contrary, they tend to lessen the use of the lines of railroad of said company, thereby lessening the revenue of said company to such an extent as to injure its financial condition, to the great detriment of said company and each and all of its stockholders
8 and by decreasing the amount of travel and the number of shipments and the ordinary flow of business in the state of North Dakota, in the territory contiguous to its lines of railroad, tends to hamper and decrease the general productive efficiency of the people of the state of North Dakota.

IX.

That said defendant railroad company did, on the 10th and 25th days of June, 1918, respectively, put into full force and effect and apply to intrastate business in the state of North Dakota, the schedule of rates and charges contained in said order of Wm. G. McAdoo, without first filing said schedule with the Board of Railroad Commissioners of the state of North Dakota, as provided by Section 4725 of the Revised Code of North Dakota for 1913; thereby permitting no complaint to be filed with said Board for hearing in which said Board could determine the reasonableness and nondiscriminatory nature of said freight rates and charges.

X.

That said orders of W. G. McAdoo, which defendant railroad company put into full force and effect and applied to the interstate busi-

ness of said company in the State of North Dakota, is the result of an unlawful abuse of power vested in said Wm. G. McAdoo by law, and enforcement of which is now, and has been during the entire period of their enforcement, an excessive and illegal burden upon the patrons of said railroad company and against the public welfare, convenience and business interests of the state of North Dakota and contrary to the laws of the said State of North Dakota.

Wherefore and in consideration of which, and inasmuch as plaintiff is remediless at or by the strict rules of common law and only relievable in a court of equity, where matters of this kind are properly cognizable, plaintiff files this, its complaint against said
9 defendant, and prays:

That said defendant railroad company, its officers, agents, attorneys and any and all others acting or to act under, for and through it or by its direction or in its behalf, may be properly enjoined and restrained from continuing in effect said schedules of rates and charges in its intrastate business in the State of North Dakota and from the collection of or any attempt to collect any of the fares, rates or charges for intrastate passenger, baggage and freight services contained in said Order of said Wm. G. McAdoo of May 25th, 1918; and that an alternative writ issue from this court against the defendants, directing them to show cause, and each of them, why such permanent injunction should not issue against the continuing in force of said schedules and the collecting of said rates, fares and charges:

That plaintiff may have such other and further relief in the premises as the nature of the case shall require and to your Honors shall seem meet.

STATE OF NORTH DAKOTA,
Plaintiff.

W. LANGER,
Attorney General and Relator.

FRANK E. PACKARD,
Counsel for Plaintiff.

10 STATE OF NORTH DAKOTA,
County of Burleigh, ss:

William Langer, being first duly sworn, on his oath says that he is the duly elected, qualified and acting Attorney General in and for the State of North Dakota, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except those matters therein stated upon information and belief, and as to them he verily believes the same to be true.

WM. LANGER.

Subscribed and sworn to before me this 14th day of February, 1919.

[SEAL.] ROY M. HALIDAY,
Notary Public, Burleigh County, North Dakota.

My commission expires Oct. 18, 1921.

11 In the Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALTER D. HINES as Director General of Railroads of the United States, Respondents.

Affidavit.

STATE OF NORTH DAKOTA,
County of Barnes, ss:

C. S. Dupuis, being first duly sworn, deposes and says, that he is now and has been for some time last past, a duly elected, qualified and acting member of the Board of Railroad Commissioners of the State of North Dakota; that for many years last past said board of railroad commissioners, as provided by Article 21 of the Compiled Laws of 1913, and other provisions of law, has exercised supervision over rates and general regulatory powers over all of the railroad companies operating lines within the state of North Dakota; that Section 4725 of the Compiled Laws of North Dakota for 1913, provides that before any fares, charges or rates may be changed by any railroad company so operating that notice must be filed with said commission at least ten days before said schedule of fares, rates and charges becomes effective;

That by an act of Congress of August 29th, 1916, the President of the United States was empowered to assume possession of, and control over, and operate the railroad systems of the United
12 States as a war measure; that pursuant to such act of Congress, the President of the United States, on December 26th, 1917, by proclamation assumed possession of and control over said railroads; that on March 21, 1918, further powers were conferred upon the President of the United States by Congress, fixing the nature and limits of such control and operation; that in pursuance of said powers thus conferred, on the 25th day of April, 1918, the Director General of Railroads, Wm. G. McAdoo, issued general order No. 28, putting into effect upon June 10, 1918, certain freight rates, and on June 25th, 1918, a certain schedule of passenger fares and baggage charges; that said freight rates contained in said order were a marked increase over the rates then prevailing in the State of North Dakota, amounting to more than twenty-five percent; and that said passenger fares and baggage charges were greatly increased in said state; passenger fares from two and one-half cents to three cents a mile and the charges governing the transportation of baggage by a large percentage;

That said rates and charges were put into full force and effect on said date without a schedule of rates, fares and charges being filed with the Board of Railroad Commissioners of the State of North

Dakota; that at the time said schedule of fares, charges and rates was put into effect by order of said Director General of Railroads, that all of the railroad systems operating in said State had filed said schedules of fares, charges and rates, and that such schedules were in full force and effect on June 10th and June 25th, respectively, 1918, and have remained on file in said offices continuously since said date;

That said order of Wm. G. McAdoo of May 25th, 1918, which put into full force and effect in the State of North Dakota, the schedule of rates, charges and fares therein contained, was unauthorized by, and contrary to the acts of Congress of August 26th, 1916 and March 21, 1918, and the proclamation of the President of
13 the United States on December 26th, 1917; that none of said fares, charges or rates prescribed in said order affected the transportation of troops, war materials or supplies by the Government of the United States, nor did they affect the issue of stocks and bonds by defendant railroad company, and in no way affected the government of the United States in the prosecution of the present war;

That all of the said charges, fares and rates contained in said order are unreasonable and excessive, and do not serve any useful purpose. On the contrary they inflict a great hardship on the people of the state of North Dakota, in that they tend to lessen the use of the lines of railroad of said company, thereby lessening the revenue of said company to such an extent as to injure its financial condition, to the great detriment of said company and each and all of the stockholders; and by decreasing the amount of travel and the number of shipments and the ordinary flow of business in the state of North Dakota in the territory contiguous to its lines of railroads, tends to hamper and decrease the general productive efficiency of the people of the state of North Dakota; that the question raised by the petition herein involves the prerogatives and sovereignty of the state of North Dakota, and is a matter vitally affecting the interest of all the people of the state; and that there is no plain, speedy or adequate remedy at law available to protect the people of the state of North Dakota from such excessive fares, rates and charges or the stockholders of said corporation from the decreased revenues resulting to said corporation therefrom.

Wherefore, this affiant prays that this honorable court issue an alternative writ of mandamus or any other appropriate writ, under the seal of said court, directed to the said Northern Pacific Railroad Company, its officers, agents, attorneys, and any and all others acting or to act under, for or through it, or by its direction or in
14 its behalf, and the said Walter D. Hines, as Director General of Railroads of the United States, restraining them and each of them, forthwith from continuing in effect said schedule of fares, rates and charges in intrastate business in the state of North Dakota, and from the collection of, or any attempt to collect, any of the fares, rates or charges for interstate passenger, baggage or freight services, contained in said order of said Wm. G. McAdoo of May 25th, 1918; that said defendants be commanded to forthwith col-

lect only such fares, rates or charges, for interstate passenger, baggage and freight service as are contained in the schedule of rates and charges of said defendant now on file in the office of said Board of Railroad Commissioners of the State of North Dakota.

C. F. DUPUIS,
Railroad Commissioner.

Subscribed and sworn to before me this 14th day of February, 1915.

WM. LANGER,
Notary Public.

15 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALTER D. HINES, as Director General of Railroads of the United States, Respondents.

Order.

On reading and filing the petition of William Langer, Attorney General of the State of North Dakota, and the affidavit of C. S. Dupuis, member of the Board of Railroad Commissioners of the State of North Dakota in support thereof, and on motion of said William Langer, let an alternative writ of mandamus issue out of and under the seal of this court, to the Northern Pacific Railroad Company and Walter D. Hines as Director General of Railroads of the United States, reciting that whereas it appears to this court by said verified petition and the affidavit in support thereof that the said William Langer is the duly elected, qualified and acting Attorney General in and for the State of North Dakota, and that the said C. S. Dupuis is a duly elected, qualified and acting member of the Board of Railroad Commissioners in and for the State of North Dakota, and that the said Northern Pacific Railroad Company is a railroad corporation engaged in carrying passengers, freight and baggage between points wholly within the State of North Dakota, and that the said Walter D. Hines is the duly appointed, qualified and acting Director General of Railroads for the United States, and that said Walter D. Hines and his predecessor in office, Wm. G.
16 McAdoo, put into force and effect, and that said Northern Pacific Railroad Company is collecting fares, rates and charges for the carrying of passengers, baggage and freight between points in the State of North Dakota, a schedule of said rates and charges which has not been filed with the Board of Railroad Commissioners of the State of North Dakota as required by law, and that a schedule of fares, rates and charges of said Northern Pacific Railroad Company are now and have been for more than a year last

past on file with the Board of Railroad Commissioners of the State of North Dakota, as required by law, commanding that said Northern Pacific Railroad Company and said Walter D. Hines desist from collecting any fares, rates, or charges for carrying passengers, freight and baggage between points wholly within the State of North Dakota, except the fares, rates or charges for said services now on file in the office of the Board of Railroad Commissioners of the State of North Dakota, or that they or each of them show cause before this court at the Capitol at Bismarck, North Dakota on the 22nd day of February, 1919 at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard why they have not done so.

Dated this 14 day of February, 1919.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of North Dakota.

17 In the Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALTER D. HINES, as Director General of Railroads of the United States, Respondents.

Alternative Writ of Mandamus.

Whereas, it appears to this court by said verified petition and the affidavit in support thereof, that the said William Langer is the duly elected, quaiified and acting Attorney General in and for the State of North Dakota, and that the said C. S. Dupuis is a duly elected, qualified and acting member of the Board of Railroad Commissioners in and for the State of North Dakota, and that the said Northern Pacific Railroad Company is a railroad corporation engaged in carrying passengers, freight and baggage between points wholly within the State of North Dakota, and that the said Walter D. Hines is the duly appointed, qualified and acting Director General of Railroads for the United States, and that said Walter D. Hines and his predecessor in office, Wm. G. McAdoo, put into force and effect, and that said Northern Pacific Railroad Company is collecting fares, rates and charges for the carrying of passengers, baggage and freight between points in the State of North Dakota, a schedule of said rates and charges which has not ben filed with the Board of Railroad Commissioners of the State of North Dakota as required by law, and that a schedule of fares, rates and charges of said Northern Pacific Railroad Com-

18 pany are now and have been for more than a year last past on file with the Board of Railroad Commissioners of the State of North Dakota, as required by law, let an alternative writ of mandamus issue out of and under the seal of this court commanding that said Northern Pacific Railroad Company and said Walter D. Hines desist from collecting any fares, rates, or charges for carrying passengers, freight, and baggage between points wholly within the State

of North Dakota, except for fares, rates or charges for said services now on file in the office of the Board of Railroad Commissioners of the State of North Dakota, or that they or each of them show cause before this court at the Capitol at Bismarck, North Dakota on the 22 day of February, 1919, at the hour of 10 o'clock A. M., or as soon thereafter as counsel may be heard why they have not done so.

Let due service thereof together with a copy of said affidavit and petition be made upon the persons to whom this writ is hereinbefore directed, without delay.

Witness the Hon. A. M. Christianson, Chief Justice of the Supreme Court of the State of North Dakota, my hand and official seal at Bismarck, North Dakota, this 14 day of February, 1919.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of the State of North Dakota.

Atest:
J. H. NEWTON, *Clerk.*

19 [Endorsed:] 3722. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Feb. 14, 1919. (Original.) Filed for service in this office the 15th day of Feb. 1919. Served this — day of ——. Returned this — day of ——. Rollin Welch, Sheriff of Burleigh County, N. D., by R. G. Phelps, Deputy. No. —.

20 Filed in the Offie of the Clerk of the Supreme Court, State of North Dakota, Feb. 25, 1919.

In the Supreme Court of the State of North Dakota.

3722.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Answer and Return to Alternative Writ of Mandamus.

Charles Donnelly, Attorney for W. D. Hines, St. Paul, Minnesota.

21 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Answer and Return to Alternative Writ of Mandamus.

Comes now Walker D. Hines, as Director General of Railroads, one of the above named defendants, and makes this his separate answer and his separate return to the alternative writ of mandamus herein, and says:

1. He admits that the relator is the Attorney General of North Dakota, as alleged, and that the Northern Pacific Railway
22 Company (erroneously named in the complaint as the Northern Pacific Railroad Company) is a corporation organized under the laws of Wisconsin, and that it has owned and still owns a system of railway lines extending from Ashland, Wisconsin and Saint Paul and Minneapolis, Minnesota, westerly through the states named in paragraph II of the complaint, and into or through the counties of North Dakota named in said paragraph, and admits that the railroad of said Company has been and now is an instrumentality both of state and interstate commerce; but he denies that said company has operated its system of transportation since December 28, 1917.

2. He admits that he is now and since January 11, 1919, has been, and that from December 28, 1917 until January 11, 1919, his predecessor in office, William G. McAdoo, was the duly appointed, qualified and acting Director General of Railroads, in possession and control of the lines of the defendant Railway Company and of nearly all of the railroad mileage of the United States; but he denies that he exercises or that his predecessor in office exercised possession and control over the lines of the defendant Railway Company through said Company.

3. He admits the averments of paragraphs IV and V of the complaint, except that he denies that the Board of Railroad Commissioners referred to therein has exercised or could lawfully exercise supervision or control over the rates, fares or charges initiated by the Director General of Railroads as hereinafter stated.

23 4. He admits that the Director General of Railroads on May 25, 1918, made his General Order No. 28, and for the determination of the scope and meaning thereof he craves leave to refer to the terms of said order.

5. He admits that in making said General Order No. 28 the Director General of Railroads acted under and by virtue of the laws of Congress and of the proclamations of the President made pursuant

thereto; but otherwise he denies the averments of paragraph VII of the complaint.

6. He denies the averments of paragraph VIII of the complaint.

7. He admits the averments of paragraph IX of the complaint, except that he avers that said rates and charges were put into effect by the Director General and not by the Railway Company.

8. He denies the averments of paragraph X of the complaint.

Further answering, this defendant alleges:

9. That by an Act of Congress approved August 29, 1916, it is provided:

"The President in time of war is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

24 10. On April 6, 1917, by joint resolution of the Senate and House of Representatives of the United States, it was duly resolved that a state of war existed between the United States and the Imperial German Government.

11. On the 26th day of December, 1917, the President by proclamation, by virtue of the power so vested in him, and by all other powers thereto enabling him, did, through the Secretary of War, take possession and assume control on December 28, 1917, of each and every system of transportation and appurtenances thereof within the boundaries of the United States, including the system of transportation of the defendant Railway Company, and consisting of railroads, etc., and all other equipment and appurtenances commonly used upon or operated as a part of such railroad or transportation systems, and did appoint William G. McAdoo as Director General of Railroads, and authorize and charge him with the operation of said transportation system.

12. Thereafter Congress, by an act entitled, "An Act to Provide for the Operation of Transportation Systems while under Federal Control, for the just Compensation of their Owners, and for other Purposes," approved March 21, 1918, did extend the authority of the President in the premises.

13. On March 29, 1918, the President made his further proclamation, of which the following is a copy:

25 "A Proclamation

Authorizing the Director General of Railroads to Exercise Powers Conferred on the President by Congress.

Whereas, by the proclamation dated December 26, 1917, taking over each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States, it was provided 'that the possession, control, operation, and utilization of such transportation systems hereby by

me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads,' and the said William G. McAdoo pursuant to said proclamation entered upon and has continued to discharge the duties of Director General of Railroads as provided therein; and

Whereas, since the issuance of said proclamation the Congress of the United States has passed an act entitled An Act to Provide for the Operation of Transportation Systems while under Federal Control, for the Just Compensation of their Owners, and for other Purposes, which act was duly approved by me on the 21st day of March, 1918, and is now in full force and effect; and in terms confers upon the President the powers specified therein and the authority to carry the same into effect; and

Whereas, it is provided in Section 8 of said act that the President may execute any of the powers therein and theretofore granted him with relation to the Federal control of systems of transportation and parts thereof, including railroads, inland waterways, etc., through such agencies as he may determine;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers and authority so vested in
26 me by said act and of all other powers me hereto enabling, do hereby authorize the said William G. McAdoo, Director General of Railroads as aforesaid, either personally or through such divisions, agencies, or persons as he may appoint, and in his own name or in the name of such divisions, agencies, or persons, or in the name of the President to agree with the carriers or any of them or with any other person in interest, upon the amount of compensation to be paid pursuant to law, and to sign, seal and deliver in his own name or in the name of the President or in the name of the United States such agreements as may be necessary and expedient with the several carriers or other persons in interest respecting compensation, or any other matter concerning which it may be necessary or expedient to deal and to make any and all contracts, agreements, or obligations necessary or expedient and to issue any and all orders which may in any way be found necessary and expedient in connection with the Federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular all acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia this 29th day of March in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-second.

WOODROW WILSON.

By the President:

[SEAL.] ROBERT LANSING,

Secretary of State."

14. On May 25, 1918, Wiliam G. McAdoo, as Director General of Railroads, made his Order No. 28, reading as follows:

"General Order No. 28.

Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and

Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled 'An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an act of Congress approved March 21, 1918, entitled 'An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.'

Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines, under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by rail-
28 road and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 25, 1918, as to freight rates and effective June 10, 1918, as to passenger fares and baggage charges, to the extent and in the manner indicated and set forth in the 'Exhibit' hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

Given under my hand this 25th day of May, 1918.

W. G. McADOO,
Director General of Railroads."

15. Pursuant to said order the Director General of Railroads, acting through the officers and agents of the defendant Company, filed with the Interstate Commerce Commission tariffs publishing and making effective for the carriage of freight, passengers and baggage between points in North Dakota, as well as between other points along its line, the increased rates, fares and charges provided for in said order and in the exhibit thereto attached, which said increased rates, fares and charges had been initiated by the Director General

of Railroads and are still in effect and are the rates, fares and charges complained of in the complaint herein and large sums of money, to-wit, many millions of dollars, have been collected under such increased intrastate rates and fares in North Dakota, and the other states of the United States, and have been disbursed.

16. On August 1, 1918, said William G. McAdoo as Director General of Railroads, acting by and through R. H. Aishton,
29 Regional Director of the Northwestern Region, appointed J. M. Hannaford Federal Manager of the lines of said Northern Pacific Railway Company and relieved the officers and agents of said Company, and all others acting through or under it from all connection therewith, and deprived them of all control over the operation thereof, and since that date the operation of said system of transportation has been and is now conducted, and the collection of all rates, fares and charges for service performed in connection therewith, has been and is now made by and in the name of the Director General of Railroads.

Wherefore, this defendant prays that the complaint herein be dismissed, that the alternative writ of mandamus heretofore issued herein be quashed, and that this defendant have such other and further relief as to the Court may seem proper, together with his costs herein.

WALKER D. HINES,
Director General of Railroads,
By CHARLES DONNELLY,
His Attorney.

MELVIN A. HILDRETH,
United States District Attorney
for North Dakota, of Counsel.
JOHN CARMODY,
Asst. U. S. Atty.

29½ STATE OF MINNESOTA,
County of Ramsey, ss:

Charles Donnelly, being duly sworn, deposes and says that he is one of the attorneys for the defendant Walker D. Hines, as Director General of Railroads; that he has read the foregoing answer and return and knows the contents thereof, and that the same is true to his best knowledge, information and belief.

CHARLES DONNELLY.

Subscribed and sworn to before me this 21st day of February, 1919.

[NOTARIAL SEAL.] F. J. GEHAN,
Notary Public, Ramsey County, Minn.

My commission expires Apr. 4, 1925.

30 Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Feb. 25, 1919.

In the Supreme Court of the State of North Dakota.

3722.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Separate Answer of Northern Pacific Railway Company.

31 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Answer of Northern Pacific Railway Company.

The defendant Northern Pacific Railway Company misnamed in the complaint "Northern Pacific Railroad Company," for its separate answer to the complaint admits all the allegations of the complaint except as hereinafter qualified or denied.

Defendant says that William G. McAdoo from on or about the 28th day of December, 1917, until on or about the first day of
32 August, 1918, exercised possession and control of the transportation system belonging to this defendant and referred to in the complaint through the officers and agents of this defendant in its employ when said federal control commenced. That on the first day of August, 1918, the said William G. McAdoo commenced to exercise such possession and control through his own officers and agents and since that day he and his successor Walker D. Hines have at all times and do now exercise such possession and control through various agents by them duly appointed. Since the 28th day of December, 1917, this defendant had no possession or control of its transportation system or any part thereof, which at all times has been in the possession and control of the President of the United States. While until the first day of August, 1918, the said Director General exercised such possession and control through the officers, directors and agents of this defendant, all such officers, directors and agents were with respect to said system of transportation absolutely under

the direction of the United States Government and not of this defendant.

Defendant denies any knowledge or information sufficient to form a belief as to each and every allegation of the complaint setting forth acts or doings of the Director General of the United States Railroad Administration; except defendant admits that the said William G. McAdoo in putting into force and effect certain advanced passenger fares on June 10, 1918, and certain advanced freight rates on
33 June 15, 1918, used the names of certain former officers of this defendant. But this defendant denies that it put into force or effect or applied the advanced tariffs complained of or either or any of them. Each and every of the said tariffs were in fact initiated by the President of the United States through the Director General, United States Railroad Administration, and were filed and published under the sole authority of the said Director General and in the manner ordered by him.

This defendant denies that each or any of the charges referred to in paragraph VIII of the complaint are unreasonable or excessive. Alleges that instead of tending to lessen revenue derived from said lines of railroad they increase the same. This defendant however says that the said charges have no effect upon the defendant company or its stockholders inasmuch as revenues therefrom are exclusively the moneys of the United States.

Defendant denies that it has any power or authority over the tariffs complained of in the complaint or any of them.

Wherefore it prays to be hence dismissed.

NORTHERN PACIFIC RAILWAY COMPANY,
By CHARLES W. BUNN,
Vice President and General Counsel.

WATSON, YOUNG & CONMY,
Attorneys.

33½ STATE OF MINNESOTA,
County of Ramsey, ss:

Charles W. Bunn being duly sworn on his oath says that he is Vice President and General Counsel of the Northern Pacific Railway Company, the defendant in this suit making the foregoing answer; that the said answer is true to his own knowledge except as to those matters therein stated on information and belief, and as to those matters he verily believes it to be true.

CHARLES W. BUNN.

Subscribed and sworn to before me this 21st day of February, 1919.
[NOTARIAL SEAL.] EDWIN IRLE,
Notary Public, Hennepin County, Minn.

My commission expires November 29, 1922.

34 Bismarck, N. D., April 1, 1919.

Pursuant to adjournment court convened at 10 a. m., all the judges and clerk of court being present:

Now the Court directed the entry of the following order:

File No. 3722.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Ordered, That a peremptory writ do issue in accordance with the views expressed in the opinion this day filed.

* * * * * * *

35 In Supreme Court, State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads of the United States, Defendants.

Under the authority vested in him by Act of Congress of August 29, 1916, the President of the United States, on December 26, 1917, issued a proclamation assuming the possession and control of the railroad systems of the United States. On March 21, 1918, an Act of Congress was approved, which provided for the operation of the transportation systems then under government control and for just compensation to their owners. Acting under Section 10 of that Act, the Director General of Railroads promulgated General Order Number Twenty-Eight, increasing freight rates horizontally and prescribing a uniform passenger fare of 3¢ per mile, not distinguishing between interstate and intrastate traffic. Held:

(1) The Act of Congress of March 21, 1918, confers upon the President extraordinary executive powers rendered necessary by the existence of a state of war.

(2) The termination of hostilities under the armistice does not justify judicial interference to restrain the further exercise of the extraordinary executive powers rendered necessary by the existence of a state of war.

(3) Section 10 of the Act of Congress of March 21, 1918, which gives to the President power to initiate rates, fares, charges, classifications, regulations and practices, is construed in the

light of the other provisions of the act and of the pre-existing method of regulating commerce through the agencies of Federal and State governments, and as so construed it does not confer original authority to initiate intrastate rates which will supersede pre-existing lawful rates prescribed by the legislature or other competent state authority.

(4) Rates initiated by the President or Director General,
36 under Section 10, are subject to review by the Interstate Commerce Commission, and its power to revise or alter is the power previously vested in it under the Act to Regulate Interstate Commerce, as amended, which gives it no authority to regulate intrastate rates as such.

(5) Under the Interstate Commerce Act, as amended, the Interstate Commerce Commission has authority to modify intrastate rates otherwise valid only when the modification of such rates is necessary to the complete exercise of its jurisdiction over interstate commerce.

(6) In the absence of a clear expression of intention to repeal existing state regulations affecting intrastate commerce, it will not be presumed that Congress so intended.

(7) Under Section 15 of the Act of March 21, 1918, which provides that nothing in the Act shall be construed to repeal, impair, or affect the existing lawful police regulations of the states except where such regulations may affect the transportation of troops, war materials, and government supplies, or the issue of stocks and bonds, pre-existing intrastate rates continue in effect as lawful police regulations.

(8) The term "police regulations," as used in Section 15, is not limited to regulations directly affecting the health, lives and morals of the people, but embraces regulations designed to prevent discrimination and economic oppression.

(Syllabus by the Court.)

Original Proceeding in Mandamus on Relation of the Attorney General.

Peremptory Writ Awarded.

Opinion of the Court by Birdzell, J.

Charles Donnelly, Minneapolis, Minn., Attorney for Director General; M. A. Hildreth, U. S. District Attorney for N. Dak., and John Carmody, Asst. U. S. Atty., of Counsel, attorneys for defendants.

Wm. Langer, Attorney General, attorney for Petitioner; Frank E. Packard, Counsel for Petitioner.

37 STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER

vs.

NORTHERN PACIFIC RY. CO. and WALKER D. HINES, Director General of Railroads.

BIRDZELL, *J.*:

On the application of the above named plaintiff an alternative writ of mandamus issued out of this court, commanding the defendants to desist from collecting any fares, rates or charges for carrying passengers, freight and baggage between points wholly within the State of North Dakota, other than those stated in the schedules on file in the office of the Board of Railroad Commissioners of the State; or that they show cause why they have not done so. The foregoing writ issued in accordance with the prayer of a complaint and petition alleging, among other things not material to be noticed, that, by virtue of an Act of Congress of August 29th, 1916, the President of the United States issued a proclamation on December 26th, 1917, following which he assumed possession and control of the railroad systems of the United States, and that he has been in such possession since January 1, 1918; that on May 25th, 1918, William G. McAdoo, predecessor in office of the defendant Walker D. Hines, as Director General of Railroads of the United States, issued General Order No. 28, whereby he directed the railroads, under his control to put into force and effect on June 10, 1918, certain passenger fares and baggage charges, and on June 25, 1918, certain freight rates, which fares, charges and rates were in excess of those previously authorized to be collected on the intrastate commerce of the defendant company within the State of North Dakota.

Separate answers were filed by the railroad company and by the said Hines, as Director General. The answer of the railroad company alleges that from December 28th, 1917, until on or about August 1, 1918, the Director General exercised possession and control of its transportation system through the officers and agents of the defendant company; but that since August 1, 1918, such possession and control have been exercised through various agents appointed by the Director General. Denying that the defendant company has any power or authority over the tariffs complained of, it asks
38 that the action be dismissed as to it.

The answer of the Director General sets forth the legal basis relied upon to support General Order No. 28, and asks that the alternative writ be quashed.

Counsel for the Director General, at the outset of the argument, expressly state that no question relating to the jurisdiction of the court is raised; that jurisdiction is conceded, and that the question before the court is one of the power of the Director General under the Rail Control act. Consequently it is unnecessary for us to consider what the authority of the Director General may be outside the Act.

There is, then, but a single question involved in this proceeding, and that is the validity of General Order No. 28 as applied to rates, fares and charges for intrastate commerce. The effect of the order, if valid, is admitted. It fulfils the intention therein expressed to increase freight rates upon all business, both interstate and intrastate, 25%, and to establish passenger fares on the basis of 3¢ per mile for both interstate and intrastate carriage (except that where the intrastate rate of fare may exceed 3¢ per mi. it is not reduced), and changes are also effected in charges for excess baggage which purport to be applicable to both interstate and intrastate commerce.

The validity of the order depends upon the construction of Section 10 of the Act of March 21, 1918, which is entitled "An Act to Provide for the Operation of Transportation Systems While Under Federal Control, for the Just Compensation of Their Owners and for Other Purposes." The section which is relied upon as containing the authority to promulgate the order in question is as follows:

"Section 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except insofar as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto, shall, upon motion of either party be transferred to the court in which it was originally
39 instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

"That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or

practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act. Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway-operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

Before entering upon the discussion of the meaning of the above section, we should note the fact that possession and control of the railroads had been assumed by the President, acting under the authority of an Act of Congress of August 29th, 1916, which provided that the president in time of war was "empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." The act, of which Section 10 first above quoted is a portion, was adopted after Federal control was an established fact. It should be stated, too, that the finding and certificate referred to in the proviso of Section 10 above were made and filed with the Interstate Commerce Commission.

The contention of the plaintiff is that the authority to "initiate rates, fares, charges, etc.," is only applicable to interstate commerce and, in support of this contention, arguments are advanced which are drawn from the history of the Federal regulation of commerce, as well as from other sections of the act in question, considered in connection with the act to regulate interstate and foreign commerce, as amended. It is also argued that the order is void on the ground that it is not apparent that the act giving such plenary power to the President was adopted for the purpose of enabling him to exercise the broad executive functions rendered necessary by the existence of a state of war. And further, that, if such powers are justified only as war powers, the justification ceased upon the signing of the armistice. It is recalled that immediately following this event the President announced to Congress, "The war thus comes to an end; for, having accepted these terms of armistice, it will be impossible for the German command to renew it." We feel that the latter contention may be briefly disposed of by referring to Section 10 of the act. It provides for the initiation of rates by the

President "whenever, in his opinion, the public interest requires." The vesting of such a power in the executive is so patently obnoxious to the competent method of rate regulation under normal conditions, that it is not to be assumed Congress would have vested the power in such terms except as a means of facilitating the extraordinary executive functions which are conferred upon the President in times of war. The power to regulate rates is legislative, and rates are initiated either by the carriers themselves, by legislation, or by a tribunal or agency, upon which the legislature has imposed the duty.

It was not until the act of June 18, 1910, that the power to prescribe a rate applicable to interstate commerce was vested in the Interstate Commerce Commission. Prior thereto, under Section 15 of the Hepburn Act of June 29th, 1906, the Interstate Commerce Commission had power to declare given rates unjust or unreasonable, but it was held by the United States Supreme Court, in Interstate Commerce Commission vs. Cincinnati, New Orleans & Texas Ry. Co., 167 U. S. 479, that the power to declare certain rates charged by the carrier to be unreasonable and unjust did not include the power to prescribe or fix rates, and, as this power was legislative in character, it could not be held to be vested in the Interstate Commerce Commission by implication. Later, however, when the Act of 1910 vested in the Commission power to prescribe and fix
41 rates, the court held, in Interstate Commerce Commission vs. Louisville & Nashville Ry. Co., 227 U. S. 88, that the statute which, in reality, delegated the legislative function to the Interstate Commerce Commission, was valid; but it was held to be valid because it provided for due process of law in such matters. The court said:

"* * * But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding, without evidence is arbitrary and baseless, and if the Government's contention is correct, it would mean that the commission had a power possessed by no other officer, administrative body, or tribunal, under our government. It would mean that, where rates depended upon facts, the commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The above language is, of course, as applicable to any attempt to confer upon the President a power to prescribe, without a hearing, rates which cannot be suspended pending a final determination by another tribunal as to any attempt to vest a similar power in a commission. The fact that Congress originally authorized the possession and control to be taken in the event of war, coupled with the fact that it expressly made applicable a rate making procedure which would be clearly unconstitutional in times of peace, is satisfactory

evidence that the possession and control of the railroads by the President is purely a war measure. As a war measure, the government necessarily assumes its constitutional obligation to make compensation. (See U. S. vs. Russell, 13 Wallace, 623, 20 L. Ed. 474). And the burden of administration was placed where it would be free from possibility of conflict with the constitutional authority to command the armies and navy, hence it devolved primarily upon the chief executive.

The foregoing observations would not be strictly applicable to the fixing of rates for a service that is supplied by the Government itself through its own agency or instrumentality. But we do not find in the act in question any evidence that Congress intended to treat the transportation systems as belonging to the Government. It rather appears that they are to be utilized primarily for war purposes, while at the same time their ordinary uses are to continue as far as possible.

It is provided, for instance, that suits may be maintained
42 against the carriers; that the rates, fares and charges are to be measured by an existing standard of reasonableness, which is to be finally determined and applied by an authority other than the President, and that the property is to remain subject to the taxing power of the states. These and other provisions sufficiently indicate the intention to continue the pre-existing legal relationship between the carriers on the one hand and the public on the other that we ought not to presume, in the absence of some definite expression, a purpose to discontinue the ordinary standards and means for determining the rights of patrons. Except to the extent that these standards and means are subordinated to the needs of the government in handling the problem before it, they still exist.

Neither can we construe the military exigency which gave rise to the necessity for the government taking possession of the transportation facilities to have terminated. The act itself fixes the period of control as one which shall continue during the war "and for a reasonable time thereafter, which shall not exceed one year and nine months first following the date of the proclamation by the President of the exchange of the ratifications of the treaty of peace." So, even though hostilities may have ceased, it is apparent that the time has not arrived for the mandatory termination of government control under the Act of Congress, or for the enforced rescission of orders thereunder, originally justified as meeting war emergencies. A reading of the legislation upon the subject of transportation in its relation to the national defense, discloses that there are many interests affected, both of the government, of the carriers and of the public, which are sought to be safeguarded through the employment of appropriate means to that end by the executive department. The variety and extent of these interests suggest numerous intricate problems to be solved by the legislative and executive departments. For these reasons it is apparent to us that the termination of Federal control can not be judicially fixed at any other time than that prescribed by Congress.

The case then resolves to a mere question of statutory construction, and in arriving at the meaning of the act the various provisions must

be read so that all may be given effect without inconsistency
43 (New Lamp Chimney Co. vs. Ansonia Brass Co., 91 U. S. 656-661) and particular words must not be selected or given an effect that will "virtually destroy the meaning of the entire context" or "give them a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive as of its obvious intent." Van Dyke vs. Cordova Copper Co., 234 U. S. 188-191. It is important that every provision of the act shall be regarded and that it shall be so construed as to give effect to its spirit and paramount purpose. In so construing the law, it is proper not only to consider the language found within its four corners, but to look as well to the history of the subject matter involved in an effort to harmonize, if possible, any provisions that are apparently conflicting.

It is true, as asserted by counsel for the petitioner, that Congress, prior to the enactment of the legislation in question, had never undertaken to regulate commerce carried on within a state. Section 1 of the Interstate Commerce Act expressly provides that it "shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one state and not shipped to or from a foreign country from or to any state or territory as aforesaid." Since this act, as amended from time to time, gives to the Interstate Commerce Commission all the regulatory authority it possesses, (unless the Federal Control Act enlarges it), it is clear that it has not been authorized to regulate, directly and primarily, intrastate commerce. It will readily be conceded that Congress possesses ample power to regulate intrastate commerce to the extent necessary to make effective its power to regulate interstate commerce: (Houston & Texas Railway Co. v. United States, (Shreveport Case) 234 U. S. 342; American Express Co. vs. South Dakota, 244 U. S. 617); but it is important to keep in mind the limitation. In the absence of clearly expressed legislative intention it will not be presumed that the power to regulate interstate commerce has been so vested in Federal authorities as to nullify every state regulation that only indirectly or remotely affects interstate business. (Reagan vs. Mercantile Trust Co., 154 U. S.
44 413; Simpson, et al., vs. Sheppard, et al., 230 U. S. 352.)

Neither are we inclined to question the power of Congress, in providing for Federal control of transportation during a war emergency, to vest in the President the full administrative power necessary to effectuate such a degree of unified control as would be independent in every respect of existing state regulations or of all state regulating authority. We are only concerned here with ascertaining whether or not Congress has vested powers in the President which may properly be exercised independently of all state regulations affecting intrastate rates. It would seem that, if it were intended to invest the President with the broadest range of authority, language would have been employed which would be wholly adequate to manifest that intent. As was said by Mr. Justice Brewer, in the case of Reagan vs. Mercantile Trust Co., supra, page 416, in interpreting an act under which a railroad corporation was organzed, "* * * there is nothing in the act creating this company which indicates an intent on the part of Congress to so remove it

(i. e., from state regulation), and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation, Congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points and also within the state, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, insofar as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the legislation of the state, passed in 1873 in respect to it, we are of the opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

Another expression opposed to the implying of restrictions on the power of the states to regulate intrastate commerce is that of Mr. Justice Hughes, in the Minnesota Rate Cases, Simpson, et al. v. Sheppard, et al., supra, page 417:

45 "If this authority of the state be restricted, it must be by virtue of the paramount power of Congress over interstate commerce and its instruments; and, in view of the nature of the subject, a limitation may not be implied because of a dormant Federal power; that is, one which has not been exerted, but can only be found in the actual exercise of Federal control in such measure as to exclude this action by the state which otherwise would clearly be within its province."

The argument that the intrastate commerce rates prescribed by the Minnesota statutes were invalid because operating prejudicially upon interstate rates was met by the following considerations, page 420:

"Having regard to the terms of the Federal statute, the familiar range of state action at the time it was enacted, the continued exercise of state authority in the same manner and to the same extent after its enactment, and the decisions of this court, recognizing and upholding this authority, we find no foundation for the proposition that the act to regulate commerce contemplated interference therewith.

"Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable, or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment did Congress seek to estab-

lish a unified control over interstate and intrastate rates; it did not set up a standard for interstate rates or prescribe, or authorize the commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had ben found; that is, with the states and the agencies created by the states to deal with that subject."

The terse statement of Mr. Justice Harlan, in delivering the opinion of the court in the case of Reid v. Colorado, 187 U. S. 137-148, supports the rule of construction for acts of Congress which we deem to be proper when the subject matter vitally affects the principal power of a state, and one which must give way to the paramount power of the Federal government only when Congress deems it wise to intervene. The statement is:

"It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested."

Since the only portion of the act in question which may be said to vest in the President the authority contended for is that portion of Section 10 giving him power to initiate rates, fares charges, etc., it remains to be seen whether, when read in connection with its context and with other sections of the act in the light of the pre-existing scheme, according to which commerce was regulated by the Federal and State governments, Congress has clearly manifested its de-
46 sire to authorize what has been done. Standing alone, the expression of authority to initiate rates would clearly be broad enough to cover both interstate and intrastate commerce. We are of the opinion, too, that this broad language was entirely appropriate. The power to "initiate" a rate is one that has always been exercised by the carriers, and with the assumption of Federal Control it was essential that the full power be placed in a Federal agency. This is a sufficient reason for vesting the power in unrestricted terms. But the crucial question — whether or not limitations upon its future exercise are not prescribed in the Act.

The same section provides for an appeal to the Interstate Commerce Commission and authorizes that body to set aside or modify any rate, fare, charge, etc., that may be found to be unjust or unreasonable. In making its findings, the authority of this body must be sought in the act to regulate commerce as amended, since it is expressly remitted to that act for authority to make its findings and enforce its orders. It is clearly the intent of Section 10, construed as a whole, to give to the Interstate Commerce Commission an authority to review that is co-extensive with the authority of the President to initiate. It is doubtless also intended to require that all rates, fares, charges, etc., initiated under the act, shall be just and reasonable in the light of the circumstances, taking into consideration the necessity for increased operating revenues. It follows from this that, if increased powers,

extending to existing lawful intrastate rates, are given to the Interstate Commerce Commission, they are given in the Federal Control Act, and it is not at all clear that such was intended. To give to the control act the construction necessary to support the contention made is equivalent to amending by implication the Interstate Commerce Act so as to extend its scope to matters which were never before embraced within it. Indeed, it is tantamount to repealing the express provision that it shall not operate as to transportation wholly within a state. This might well have been the intention as to matters not previously covered by state regulations; but it is another matter entirely to ascribe such an intention as to a field of regulation already occupied.

47 That it was not intended to entirely supplant pre-existing regulations of the states seems to us to be even more clearly demonstrated by Section 15. The section is as follows:

"Section 15. Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies or the issue of stocks and bonds."

The foregoing section lays down a rule of construction for the entire act according to which it shall not be held to amend, repeal, impair or affect existing lawful police regulations of the several states, except wherein such regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds. The query arising from this section is, does the expression "lawful police regulations" include existing regulations with respect to intrastate rates, fares and charges? It is contended on behalf the Director General that such regulations are not included because, it is stated, the regulation of rates is not an exercise of the police power of the state. In support of this contention, it is argued that the police power, in the exercise of which lawful police regulations are made, is one which exists for the general welfare of society and is, therefore, one which cannot be bargained away. Attention is called to the fact that the regulation of rates is frequently accomplished, to a degree at least, by the exercise of the power to contract. We fail to perceive the force of the argument that would remove rate regulations from the category of the lawful police regulations of the state on account of the practical necessity which has rendered necessary the recognition of contract obligations originating in franchises. Never, since Lord Hale gave expression, in his De Portibus Maris, to the principle according to which pu-lic callings are subject to regulation, has there been any doubt of the right or the power of the state to regulate charges. In fact, it was the exaction of "arbitrary and excessive duties for cranage, wharfage, etc.," that led to the exercise of the power of control which was vindicated in the statement referred to. (See 2 Hargrave Law Tracts, 78). That this power is a part of the state's police power is hardly open to question, since

48 the decision in Munn vs. Illinois, 94 U. S. 113. In that case, Chief Justice Waite, delivering the opinion of the court,

quoted the definition of the police powers as framed by Chief Justice Tawney in the License Cases, 51 Howard, 583, in which he referred to them as "nothing more or less than the powers of government inherent in every sovereignty * * *; that is to say * * * the power to govern men and things." They were said to be powers which sprung from adherence to the maxim "sic uteri tuo ut alienum non laedas." It is the purpose of all rate regulation to preserve the common right to the service rendered in a public calling at a reasonable cost. Fundamentally, this is as much a matter of police regulation as are regulations designed to protect health and safety or to prevent discrimination. It matters little whether, in considering specific arrangements looking toward the security of the rights of the public in relation to common carriers, it may become necessary to recognize contractual arrangements made by a legislative body as a practical expedient; the power to regulate the rate is in its essence police, and the exercise of the power results in a "police regulation."

In the case of Reagan vs. Mercantile Trust Co., supra, it will be noted that the United States Supreme Court expressly characterized state regulations of rates as "police regulations" in the following expression:

"* * * we are of the opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates and other police regulations."

But, it is contended that the term "police regulations" appearing in the statute is one which may be used either in a limited sense or in a very comprehensive sense and that in the statute in question it is used in its "ordinarily accepted sense" as referring to the exercise of the power to protect the health, lives and morals of the people (Manigault v. Springs, 199 U. S. 473-481), rather than in the broader acceptation which, in reality, embraces everything essential to "the great public needs." (Noble State Bank vs. Haskell, 219 U. S. 104-111; Barbier vs. Connolly, 113 U. S. 27). In substance, the contention is that the particular sense in which the term is used
49 in a given place must be gathered from the context. We find nothing in the act, however, which, in our opinion, makes it necessary in executing its various provisions to distinguish between those police regulations that affect the health, lives and morals of the people and those that protect their convenience and economic welfare.

The argument that the reservation of "lawful police regulations" rather than the police power shows a purpose to limit the scope of the meaning is well met by a comparison with the reservation of the taxing power in the same section. The section preserves in full, not only the existing laws of the states relative to taxation, but it preserves as well, unimpaired, the power to tax. (See Congressional Record, Vol. 56, part 4, page 3313.) So the states may pass such future legislation upon the subject of taxation as would be constitutional if the roads were in private hands; provided, of course, it does not interfere with the transportation of troops, war materials, and government supplies. The roads are not declared to be in public ownership, and the power to tax is as broad as the similar power over

roads incorporated by act of Congress. (Union Pac. R. R. Co. v. Peniston, 18 Wall. 5; See also Congressional Record, supra), or as conceded by act of Congress in the case of National Banks. On the other hand, with regard to the police power generally, it is not to be exerted anew, or in a different measure or manner during Federal control from that existing before. The act only continues in force the existing police regulations, and the railroad administration is not bound to respect any additional police regulations. Centralization of administrative authority free from future interruptions was accomplished, but Congress accepted the status quo ante, so far as police regulations were concerned; and it authorized them to be ignored only when necessary to secure military efficiency in the matter of the transportation of troops, war materials, and government supplies.

The suggestion that a rate prescribed by statute, from which a carrier is prohibited from departing under penalty, is not a police regulation concerning the carriage of intrastate commerce, seems to us also as hereinabove indicated, to ignore the fundamental considerations that determine the validity of such regulations. In
50 Reagan vs. Farmers' Loan & Trust Co., 154 U. S. 362, it was said:

"There can be no doubt of the power and duty (of the courts) to inquire whether a body of rates imposed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction of rights of property, and if found to be so, to restrain its operation."

To a similar effect are Covington, etc., Turnpike Road vs. Sanford, 164 U. S. 578, and Lake Shore & Mich. S. Ry. Co. vs. Smith, 173 U. S. 684; German Alliance Insurance Co. v. Lewis, 233 U. S. 389. Rates are regulated because the business is affected with a public interest. Every regulation must be measured by the yard stick of reasonableness and must fall short of prohibition, destruction or confiscation in order to be valid. (Freund on Police Power, Section 63.) Nothing, it seems to us, falls more properly within the domain of police regulations than rules prescribed as a means of preventing economic oppression and securing equality of right to the service in a public calling. (See Freund on Police Powers, Section 378.)

A strong indication that the term "police regulations" was used in a much broader sense than that contended for is the fact that, in making exceptions to the regulations that should continue in force, Congress saw fit to expressly except regulations affecting the issuance of stocks and bonds. It will be noted that Section 7 gives to the President, in unambiguous terms, the right to control the issuance of securities during the period of Federal operation. Yet it was thought necessary in Section 15 to expressly except from the police regulations of the states which were to continue in force those affecting the issuance of stocks and bonds. Clearly these regulations are of a character that would not directly affect the public health, safety or morals. They are as much designed to protect the economic welfare of society as are those relating to rates, and there would have been no occasion to make the exception had the term "police regulations" been used in the sense contended for. (A statute of this character was involved in

a recent case, Union Pacific Railway Co. vs. Public Service Commission, U. S. Supreme Court, October Term, 1918, No. 65.)

The congressional history of the act in question, appended hereto, in our judgment, amply supports this construction. When
51 the bill originally passed the Senate it provided only for the continuation of the states' powers to tax. It was amended, however, in the House, by the addition of the following clause:

"Or the lawful police regulations of the several states, except wherein these regulations may affect the transportation of troops, war materials, or government supplies, *the regulation of rates, the expenditure of revenues, the addition or improvement of properties* or the issue of stocks and bonds." (Congressional Record, Vol. 56, Part 3, page 2820.)

The foregoing clause, after being tacked on to the provision "that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation," as previously contained in the bill, was transferred to the end and became a new section,—now Section 15. The conference committee later, reporting to the House and Senate, struck from the exceptions to the proviso above those exceptions which are italicized. This is a matter of some significance in determining the sense in which the term "police regulations" is used. If the exception of "the regulation of rates" previously inserted, had been allowed to stand, it is clear that every existing state regulation affecting rates would have been rendered nugatory upon the promulgation of an order by the Director General superseding such rates, whether or not the transportation of troops, war materials, or government supplies was affected, and the power would have existed just as it is contended for in this case. The striking of that clause, however, from the exceptions, indicates and intention to preserve existing state regulations affecting rates, except in so far as the transportation of troops, war materials and government supplies may be affected. To this must also be added, we believe, the power to prevent existing intrastate rates from operating in such a way as to result in unlawful discriminations on account of such regulations as it may be found necessary to promulgate in operating the roads as a unit.

As hereinbefore stated, the Federal government is supreme in the domain of interstate commerce and there is nothing in this act to indicate that the regulatory power, as it previously existed, was intended to be modified in the slightest degree by existing state
52 regulations. All the powers possessed by the Interstate Commerce Commission are to continue except the power to suspend rates.

In the case of Houston & Texas Ry. Co. v. United States, supra, the Supreme Court of the United States held that under Section 3 of the original Act to Regulate Commerce, February 4, 1887, (see 104, 24 Stat. 379-380) Congress having prescribed disciminatory rates and practices, the commission had authority to correct unjust discriminations even though, in so doing, it became necessary to alter pre-existing rates on intrastate commerce. Thus, under the power previously possessed by the commission, under the Act to Regulate Com-

merce, it would have full power to alter any intrastate rate that might result in an unlawful discrimination by reason of the initiation of a new interstate rate by executive authority, or that may result from a valid routing order. To the same effect is the recent case of American Express Co. v. South Dakota, supra.

The order in the instant case, as it relates to intrastate commerce, does not purport to have been promulgated for the purpose of obviating discriminations. On the contrary, a portion of the order, at least,—that which relates to intrastate passenger fares—cannot possibly be justified on any such basis as a simple illustration will suffice to demonstrate. Prima facia, it creates discriminations by disturbing the balance of preexisting fares that were just and reasonable. Prior to the order in question intrastate tickets were sold to and from all points within Minnesota at 2c. per mile; from and to all points within North Dakota at 2½c. per mile; and from and to all points in Montana at 3c. per mile, and the interstate fares were based upon the local rates. These intrastate fares were all presumptively legal and had been in operation for some time. Such differences as existed were readily accounted for by differences in cost of constructing roads in the various states, density of traffic, etc. Yet the necessity demanding increased revenues from the purely intrastate business was not recognized in the order as being general. The burden is not distributed by percentage increases that will affect all localities alike, but the patrons in one state are required to pay 50% above the previous lawful and reasonable fare, in another 20% above, and in the other no additional charge is imposed. This is a sufficient demonstration that
53 a portion of the order at least is not to be justified as a means of preventing discrimination: so it would not fall within any regulatory power previously exercised by the Federal government or possessed by the Interstate Commerce Commission.

In considering the character of Order No. 28 in its direct effects upon intrastate commerce, it is also proper to note that all rates initiated are to be measured upon review by the Interstate Commerce Commission according to the "expenses of Federal control and operation fairly chargeable to railway operating expenses," and to pay certain fixed charges. This is not a blanket authority to increase rates, but a limitation. Its true character is perhaps best understood by referring to the very substantial appropriation of $500,000,000 to be used as a revolving fund, and to the then recent fact of the denial by the Interstate Commerce Commission of an application for a general increase of 15% in interstate freight rates. Ex Parte, (The Fifteen Percent. Case) 45 I. C. C. Reports, 303. These facts, together with the further well known fact that by far the larger percentage of earnings is from interstate commerce, do not indicate that a percentage raise on all traffic or that a mileage raise on a portion of the passenger traffic was in contemplation. On the contrary, they rather indicate that, at the time Congress passed the control Act, there was no immediate necessity for increased revenues, and that, if such necessity should arise, it was contemplated that it could be fully met by applying the remedy which had so recently been sought, and without making possible a general repeal of

numerous laws of sovereign states whenever, in the judgment of the Director General, such repeal might seem to be desirable for reasons apart from military efficiency or even to enable the exercise of an unhampered control of interstate commerce.

The requirement that the Interstate Commerce Commission shall take into consideration "the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition" does not, in our opinion, broaden the authority of the Director General or the Interstate Commerce Commission except where it may be sought to correct conditions incom-
54 patible with a unified system and which were probably due to previous unwholesome competition.

The congressional debates affirmatively disclose that the propriety of compelling the patrons of the railroads to pay all additional costs incident to Federal control was considered and weighed as against the plan of meeting prospective deficiencies, in part at least, by congressional appropriation. The question is one with which Congress might well be concerned, for upon its decision would depend whether additional burdens directly due to the war are to be borne by taxation, or whether the particular burden must be borne by those who use the service,—a service which has been inextricably interwoven into the business fabric of the nation. In the act it is clearly contemplated that only such added burden may be placed upon the traffic as is "fairly chargeable to railroad operating expenses," and the President is also authorized to meet defficiencies from the appropriation. The act, as we view it, is neither a revenue measure nor a general license to supplant pre-existing regulations made by competent authority.

Another significant fact which is disclosed by a study of the Congressional debate upon the subject of the rate-fixing power is that all of the discussion of Section 10, pertaining to the power given the President to initiate rates, concerns only the merits of that proposal as compared with a proposal to vest the power directly in the Interstate Commerce Commission, so that it might continue to exercise, in but slightly modified form the authority previously vested in it. Nowhere was it suggested that the powers of the commission should be extended to embrace original regulations of intrastate rates, nor was it ever intimated, so far as our observation goes, that the powers contended for were being vested in the executive.

Being of the opinion that the rate statutes of this state and the tariffs on file with the State Railroad Commission, in accordance with statutory requirements, insofar as they pertain to intrastate commerce, have not been lawfully superseded by any competent order made by the Director General under the Rail Control Act, and particularly by General Order Number Twenty-Eight, a writ will issue in accordance with the views expressed in the foregoing opinion.

L. E. BIRDZELL.

J. E. ROBINSON.
A. M. CHRISTIANSON.

55 STATE ex Rel.

v.

NORTHERN PACIFIC et al.

J. E. Robinson.

ROBINSON, *J.* (concurring specially):

This is an action by the State of North Dakota against several railway carriers and those who control and operate the railways, to prevent them from continuing to rob the people by the exaction of excessive passenger and freight rates, contrary to the laws of the State. The right of action arises under the constitution and laws of the State, and not under the laws of the United States. Hence, the jurisdiction of the Court is in no way questionable, and it is expressly and fully conceded. In the operation of the public highways between points within the State there must be a compliance with the laws of the State, or the laws are not laws, and the courts must maintain and uphold the laws of the State and protect the people from plunder and robbery in any form, or else the Courts are mere cravens and not Courts.

The claim is that the railroads are operated under acts of Congress, by direction of the President, and his appointed Director General, and it is conceded that the operation is not in accordance with the laws of the State. As it appears, on every railroad and system of railroads in the United States, extending over about four hundred thousand miles, the passenger fares and freight rates have been advanced from twenty-five to fifty per cent. The advance was made as a war measure under the plea of military necessity, but now, in this year of peace, it is continued in defiance of the just laws and powers of the several states. The assumed railroad control and the orders of the President are based on two acts of Congress: In August, 1916, at the time of some trouble with Mexico, Congress passed an act as follows: "The President in time of war is empowered, through the Secretary of War, to take possession and control of any system of transportation and to utilize the same for the transportation of troops, war material and equipments." This was a nice rider on the army appropriation act, covering forty-eight pages of the statute. (Vol. 39, p. 645). The rider is short and simple. Its manifest purpose was to authorize the President in time of war to use the military force to control and operate railroads for the removal
56 of troops and war supplies—"only that and nothing more."

But, in December, 1917, after Congress had declared war against Germany and Austria, the President magnified his power and issued a fiat or proclamation assuming the possession and control of all railroads for all purposes, regardless of any military necessity. The fiat decreed that the possession and control should be in his famous son-in-law, as Director General. By the same fiat the President attempted to legislate and he decreed that except with the

written consent of the Director General, no attachment by mesne process or by execution should be levied on the property of the railway carriers; that no suit may be brought against them, except as permitted by the general or special order of the Director. By this order the President innocently attempted to repeal or suspend a vast system of Federal and state laws and constitutions and to make his famous son-in-law the greatest dictator on earth. But, in March, 1918, Congress passed the Federal Control Act, which expressly repealed the legislative part of the fiat. The act provides this: That actions at law and suits in equity may be brought by and against such carriers and judgments rendered in actions at law or suits in equity against the carriers. And that no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Government. Under that act it is manifest that wrongdoers who control a common carrier and exact excessive rates and fares in defiance of the laws of the state cannot defend themselves on the ground that in so doing they are an agency of the Government.

Section 10 of the act provides the President may initiate rates, fares and charges by filing the same with the Interstate Commerce Commission and "that said rates, fares and charges must be just and reasonable. Also, that on complaint the justness and reasonableness of such rates may be determined by the Interstate Commerce Commission in accordance with the Act to Regulate Commerce, as amended. But as the act of commerce gave the Commission no power to regulate rates between any two points or places of a state, it must be that the Federal Control Act refers only to inter-
57 state rates. Congress did not contemplate that the President or his Director General should attempt to initiate intrastate rates, contrary to the laws of any state. Certain it was not within the power or the purpose of Congress to give the President and his famous son-in-law the right to repeal and undo the rate laws of any state. That is shown to a demonstration by section 15 of the act:

"Section 15. Nothing in this act shall be construed to repeal, impair or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies or the issue of stocks or bonds."

Now in reading Section 15, some question may arise as to what is meant by the lawful police power of the several states. Does it include the rate making power; does it include a power to prevent the people from being robbed by the excessive rates and exactions of carriers or by those in control of them? Clearly the purpose of police laws and police powers is to prevent filching, robberies and holdups, to protect life, liberty and property. So far as a man is dispossessed of his property, his means of living are impaired. "You do take my life when you do take the means whereby I live." The carrier is employed by the force of necessity. When the employer is forced to pay excessive rates, then, to the extent of the excess, he is filched, robbed and held up. "Such is the scope of police power

that it extends to the protection of the lives, health, comfort and quiet of all persons and the protection of all property within the state." (8 Cyc. 864). Under the police power the legislature may enact just laws that common carriers shall not charge more than certain maximum rates. In every state such laws have been passed and have been uniformly sustained by the highest courts. (8 Cyc. 874). Hence it is that nothing in the Federal act must be so construed as to amend, repeal, impair or affect the lawful police regulations of the several states.

As the Federal Control bill was first submitted to Congress
58 it was strictly an administration measure, conforming to the proclamation of the President, but in each House, and in conference, it was carefully considered and finally passed with salutary amendments, and among them the last and most important was Section 15. While the act empowered the President to initiate interstate commerce rates, subject to review by the Commission, it expressly provided that the rates should be just and reasonable. It did not contemplate the addition of a billion dollars a year to the burden of the wealth producers by a general and uniform advance of fifty per cent. on all rates and fares. And this Court may well take official notice of that fact that such an advance was not just or reasonable; that it was contrary to a recent and prior ruling of the Interstate Commerce Commission refusing to permit an advance of fifteen per cent.

It was in the Spring of 1918, when the food supplies were reduced and when the people were contributing their utmost to the war fund, that Congress gave the carriers half a billion dollars, and then, by advance rates, the Director General gave them one billion dollars. Without any such advance James Hill run his railroads and in the course of a few years he saved up for himself and heirs over one hundred millions of dollars, besides good sums for many others. Under the former rates in a few decades the rail carriers succeeded in filching from the people ten per cent or one-tenth of the total wealth of the nation.

There is no reason extending the discussion. It is a well known fact that the rail carriers have always charged excessive rates and that they are fast amassing the wealth of the country. By skill, prudence and economy the Director General might well have reduced the cost of operating the railroads, and indeed, when the Federal Control bill was before Congress, he was called as a witness and gave assurance that the result of Federal control would be to reduce the expenses—and such was the assurances under which the bill was passed. The Director could well have reduced the burden of rates and fares instead of advancing them, however that may be, now that the war has ended, there is no longer any reason or excuse
59 for any person on earth to operate railways in disregard and defiance of the lawful police regulations of the several states. It is beyond the constitutional power of Congress and the National Government, and so far as persisted in, it must lead to anarchy, Bolshevism and endanger the safety of the Republic. Mandamus awarded.

J. E. ROBINSON, *Judges.*

60 STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER

v.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER B. HINES, Director General of Railroads.

GRACE, *J.* (dissenting):

An alternative writ of mandamus was issued out of this court. The purpose of such writ is to command and prohibit the defendants from collecting increased fares or rates over and above those stated in certain schedules on file with the Board of Railroad Commissioners of this state for carrying passengers, freight and baggage between intrastate points, or to show cause why the rates, fares and charges specified in said schedules should not be in force instead of the increased rates initiated by the President of the United States and which are now being charged and collected. Walker B. Hines is the direct representative of the President of the United States and together they represent the United States, so that, in fact, the action is one of the State of North Dakota against the United States to determine the authority of the defendant to initiate and collect the rates complained of.

Congress passed an act which was approved August 29th, 1916, by which the President, in time of war, is empowered through the Secretary of War to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion, as far as may be necessary, of all other traffic thereon for the transfer or transportation of troops, war material and equipment or for such other purposes connected with the emergency as may be needful or desirable. Congress, by an act of March 21st, 1918, gave the President, during time of war, control of all traffic over systems of transportation with exclusive power to initiate rates, fares and charges by filing them with the Interstate Commerce Commission within the time and manner specified in the act under consideration. Congress in the exefcise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives on the 6th day of April, 1917, formally declared war against the Imperial German Government; in such resolution, Con-
61 gress authorized and directed the President to employ the entire naval and military forces of the United States and the resources of the government to carry on war against the Imperial German Government, and to bring the conflict to a successful termination, Congress pledged all of the resources of the United States. On December 7, 1917, the Congress of the United States, by resolution, declared war to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government, and this resolution contains the same authority and direction to the President as is contained in the resolution wherein war was formally declared against the Imperial German Government, with reference to the employment of the entire naval and military forces of the United States and the resources thereof, and the pledge of all the resources of the

United States to bringing the conflict to a successful termination. Under and by virtue of the authority vested in the President of the United States by authority of the act of August 29, 1916, he did through Newton D. Baker, Secretary of War, take possession of and assume control at twelve o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof, located wholly or in part within the boundaries of the continental United States, as is more fully shown and set forth in the proclamation at that time by the President of the United States duly issued and published. By this proclamation was not taken over electric passenger or interurban railways, but the right was reserved by subsequent order or proclamation to do so if it were found necessary or desirable. It was further stated in the proclamation that by subsequent order and proclamation, possession, control and operation in whole or in part might be relinquished to the owners of the railroad systems *of* railroad and water systems, the possession and control of which had been assumed. Congress, on March 21st, 1918, approved the act for the operation of transportation systems while under federal control which provided for the just compensation of their owners and for other purposes.

The construction of certain sections of this act is the task
62 with which we are confronted. For the purpose of properly construing the Federal Control Act and war powers of the President, it would be well to mentally place ourselves back to the 28th day of December, 1917, and from thence look forward into the future as it then presented itself; instead of looking from the point where we now are retrospectively to the 28th day of December, 1917. If we should do this, we would realize that transportation for war purposes and as a whole under private control had largely become inefficient; that at such time there were millions of soldiers to be transferred to training camps; that millions upon millions of tons of war material were to be transported from the place where produced to the place of manufacture and the finished product again to be transported; that millions of tons of food stuffs and clothing had to be transported to the various places where the soldiers were in camps for their use. The magnitude of transportation for war purposes alone was so stupendous that it is almost beyond the comprehension of those not so situated as to have an opportunity to acquaint themselves with the immensity of the task of the transportation of the necessities of war. It must be remembered that all of this was an added burden to the transportation facilities of our country. Again, we think it is a matter of common knowledge that the transportation systems, prior to the declaration of war and prior to the time the almost illimitable amount of war transportation was added to the work of the transportation companies, were finding difficulty in properly handling and transporting the products of trade, production and manufacture which were tendered them for transportation during times of peace. It is apparent, therefore, that federal control was taken for the purpose of facilitating transportation and systematizing it to the end that transportation systems, under federal control, would be efficiently reorganized so that more service could be

rendered by them and much more material transported over them.

We must also keep in view the fact that when war is once officially declared by the duly constituted authorities of the United States with whom the power is placed, by the constitution, to declare war, that a state of war continues to exist until a treaty of peace is signed
63 with those against whom war was declared and until such treaty of peace by the president's proclamation is duly proclaimed. The President having by due proclamation taken over the transportation companies, each and every official and employee and all those who entered the employ of the transportation companies after being taken over by the federal government were thereafter by proper authority duly constituted and made officials and employees of the federal government, and, as such, were employed and paid by the federal government. With these preliminary observations, we may proceed to examine some of the real issues presented in this case. The paramount issue presented is that which relates to .

A Conflict of Power.

The conflict of power arises between certain tribunals, as state railroad commissions, possibly the Interstate Commerce Commission, and the powers conferred upon the President under the Federal Control Act, or possibly other war powers possessed by the President, as to which has the lawful authority to fix passenger and freight rates and other charges during the time of the war, on intrastate commerce. We think in -his discussion it will not be necessary to advert to other war powers possessed by the President than those conferred upon him by the Federal Control Act. In time of peace, it may be conceded that certain state tribunals, as the state railroad commission, have the exclusive power to fix all intrastate rates of transportation, likewise the Interstate Commerce Commission, in time of peace, has exclusive power to determine the reasonableness and justness of rates affecting interstate commerce, and since the act of the Interstate Commerce was amended, the power to prescribe rates and the power to prescribe an intrastate rate where that rate is such as to cause a discrimination in an interstate rate between a point or points within the state to a point or points without the state. These constitute the general powers of such tribunals in time of peace. They are such powers, however, as are intended to be exercised only in times of peace, with the exception that Interstate Commerce retains power, in the act under consideration, upon complaint being made, to pass upon the reasonableness and justness of rates initiated in war times by the Presi-
64 dent, and, with this single exception, all other powers with reference to rate making and the fixing of charges and fares for transportation systems are, by the Federal Control Act, suspended during time of war; such power is supplanted, for the time of war, by the power of the President to initiate rates, which when initiated by him become binding and effective as to every kind of transportation from the time they are filed with the Interstate Commerce Commission, and are subject to no change except, upon complaint to the Interstate Commerce Commission, such rates and fares may be ex-

amined as to their reasonableness and justness which must be determined upon the conditions which exist in time of war and not those of peace. With this exception, there is no limitation upon the power of the President with reference to the initiation of rates, charges and fares. The power of the President under the Federal Control Act to initiate rates, fares and charges contains no limitation as to kind, and extends equally to interstate and intrastate fares, rates and charges. The Federal Control Act contains no limitation other than as above stated. It is claimed there is a limitation by Section 15, but we will disprove this contention later in this opinion.

The power conferred upon the President by the Federal Control Act with reference to rates was intended to be a power with which there could be no interference, with the exception of that of the Interstate Commerce as to the reasonableness and justness thereof. The power was intended by Congress to be one which would enable the President by use thereof to accomplish without delay or interference the objects intended to be accomplished by the Federal Control Act. If this be true, then the rate making powers of all other tribunals must be suspended during the time of war, including that of the Interstate Commerce Commission, except as it is preserved in the Federal Control Act. If, as is contended by plaintiff, the power to initiate and prescribe rates as to intrastate remained the same in time of war as in time of peace, then it would be within the power of the state or states, through the railroad commissions, or rate making power within the state to make any power conferred upon the President by the
63 Federal Control Act an empty, impotent power. The President having at a certain date advanced the freight rate twenty-five per cent on all freight thereafter carried by the transportation systems within the continental United States, the effect would be to increase the intrastate rate twenty-five per cent. Let us assume that, after the President had initiated such advanced freight rate, each state railroad commission should thereafter proceed to fix the intrastate freight rates and readjust them and that the final result of their deliberations resulted in a decrease of intrastate freight charges of thirty-five per cent; it is not difficult to comprehend that if such could be the case, the advanced freight rate so initiated by the President of the United States for a war purpose, at least in part would fail of accomplishing the purpose for which it was intended, and in this discussion it must be assumed that the President would not advance the rate any more than the necessity of war required. The twenty-five per cent advance of freight rates initiated by the President did affect all freight and was chargeable upon all freight both intrastate and interstate. If, as contended by the plaintiff, the power to fix intrastate rates remained during time of war, unimpaired by the order of the President which made the twenty-five per cent increase in intrastate freight rates, and if such order of the President was subordinate to the power of the railroad commission of the state to prescribe the intrastate rate and determine its reasonableness and justness, under this contention, before the President could make effective the said increase on intrastate rates, it would be necessary for him to procure the assent of the rate making power of each state before he would have power to in-

crease the intrastate freight rate in the manner in which it was increased. If the President were required to do this, it might take a long period of time before the President would get the rate making power of each state to approve of the intrastate rate initiated by him. If the State, in war time and in the light of the Federal Control Act, possesses the power above claimed for it, such power would constitute a limitation on the right of the President to initiate rates and
66 fares and the possession and use of such power by the state, in time of war, could not but affect the transportation of troops, war material and government supplies and, in addition to this, have a general tendency to decrease the efficiency of the systems of transportation in general.

We are satisfied that during war time, in view of the Federal Control Act, no state tribunal has any authority to initiate, prescribe, determine or fix an intrastate rate; that by the Federal Control Act, during the time of war, the power to fix rates and charges both interstate and intrastate was placed exclusively with the President and he has the exclusive power to initiate them, no other power can initiate rates or charges, and such rates and charges as he does initiate under such power can only be examined as to their reasonableness and justness by the Interstate Commerce Commission. The Federal Control Act was meant by Congress to become effective at once and to become an effective means in the hands of the President, whereby he could wholly control and operate the transportation systems of the United States, including the exclusive power to initiate rates and charges for transportation. Congress did not intend that the President in time of war should be hampered nor delayed in any manner in the control and operation of transportation systems so taken over, and, for that very reason, placed the exclusive power to initiate the rates and charges with him; and in order that the President might immediately proceed in such matters and make the transportation companies more efficient and that such powers might be at once exercised, it was declared that the act in question was emergency legislation, and that fact is evidence that it was the intention of Congress that all powers therein conferred by Congress upon the President were to be exercised by him promptly and without delay; this was indisputably necessary by reason of the pressing necessities then existing for immediate efficient transportation. The power to initiate all rates and charges was lodged with him during the time of war, thus removing from his path the power of state tribunals, such as railroad commissions, during such time, to interfere with the rates or charges for transportation initiated by
67 the President.

It must also be remembered, in construing the Federal Control Act and the President's right to initiate an increase of twenty-five per cent in the freight rate, that certain conditions existed of which the following may be mentioned: the large increase in the wages of thousands upon thousands of employees who were operating the transportation systems while under Federal control, the millions of dollars that must be expended to rehabilitate the transportation systems to make them more efficient in transportation,

the accumulation of a reserve fund to insure a ready means to maintain the efficiency of the system, and many other matters we might mention which would demonstrate the necessity of an increased rate or charge. It must follow that the power to initiate and make effective such increased rates or charges in time of war and in view of the immediate necessity, must be lodged where it could be exercised immediately and where the exercise of it could not be delayed by agencies such as a state railroad commission, which had theretofore exercised such power. Hence, the power to initiate rates and charges, either passenger or freight, of the transportation systems was exclusively, by the Federal Control Act, placed with the President with no limitation other than, upon complaint, an examination might be had of them before the Interstate Commerce Commission to determine the reasonableness or justness thereof. We think the interpretation we have so far given the act in question is correct. We are strengthened in this assumption by the contemporaneous construction given the act by those upon whom devolved the duty of interpreting and enforcing the act and also by the interpretation given the act by those who were affected by it; during all the time of the operation of the act until the present time neither the railroad commission of any state nor shippers nor anyone compelled to pay the increased interstate or intrastate rate has made any complaint. They and all persons affected by the act have uniformly placed the same construction upon it as the President of the United States did. They have acquiesced in the construction thus placed upon it by the President of the United States and those charged with its
68 enforcement. The act being one the powers of which the President was to execute his acts thereunder must be considered executive acts. It must be conceded that he used his best executive discretion in the execution of such powers and this being true, the court should be reluctant to interfere with his exercise of such discretion.

The most important remaining point to be discussed is the meaning of Section 15, which is to the effect that nothing in the act shall be construed to amend, repel, impair or affect the existing laws or powers of the state in relation to taxation or the lawful police regulations of the several states except wherein such laws, powers or regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds. It is claimed by the state that the power to prescribe or initiate a rate or charge for transportation is a police power. Assuming that to be true and assume, further, that every state law, to a greater or lesser extent, is a police power in that, in some degree either present or remote, it may affect the health, safety and morals of the people of the state, it is clear that as the term is used in Section 15, it has no such extended meaning. What is intended by the words "police regulations" as used in Section 15; are those police regulations with which all are familiar, those which it can readily be understood have a direct relation to the health, safety or morals of the people? The words are susceptible of two uses: one broad and comprehensive, the other narrow and restrictive. If we speak of the initiation or regu-

lation of rates and charges as a police regulation or a police power, the use is in the broad and comprehensive sense; when we say that the police powers are as broad as the sovereignty of a state, this is the most comprehensive sense; but, as the words are generally used and commonly understood by the great mass of people within the state or within the nation, they have a restricted meaning and mean only such police powers or regulations as exist for the purpose of directly protecting the health, safety or morals of the people. For instance, a police regulation which prescribes quarantine in case of smallpox or other contagious or infectious disease, is a police regulation which acts directly to protect the health of the people by preventing the spread of the disease; and so an illustration might be given as applying to morals or safety, and it is in this restricted sense that the word is used in Section 15. Certainly the words "police regulations" in Section 15 do not refer to rates, for Congress by Section 10 of the act had wholly disposed of the rate question. It had, by that section, placed the power, during the time of war, exclusively with the President to initiate rates and this meant all rates and every kind of a rate relating to transportation and had it exclusively placed the power during the time of war to review the reasonableness and justness of such rates with the Interstate Commerce Commission.

There is a well-settled rule of statutory construction, which is, that the intention of the whole act will control the interpretation of the parts. Sutherland on Statutory Construction, 319. The intention of the Federal Control Act is easily discerned. It plainly appears from it that it was the intent of Congress to place the control and operation of all transportation systems with the President and that he had full authority to initiate all rates, fares and charges for transportation. This was the cardinal purpose or intent of the whole act. Each part of the act must be construed in harmony with the general intent and cardinal purpose of the act. Section 15, being a part of the act, must be construed so as to harmonize with the general intent and purpose of the act as expressed in it, and which we have above pointed out.

The powers enumerated and granted in the Federal Control Act to the President are wholly and exclusively war powers. When the war shall have been terminated and treaties of peace shall have been signed with those with whom we are at war and when such treaties of peace have been duly proclaimed by the President, we shall then have returned to a state of peace and after the expiration of not more than twenty-one months thereafter the war powers conferred upon the President in the Federal Control Act will not further be effective so long as a state of peace continues. At the expiration of twenty-one months after a treaty of peace has been signed and by the President proclaimed and in the absence of further federal legislation retaining for a longer period of time control of the transportation systems of the United States, or unless the President has theretofore relinquished such federal control, such transportation systems will be returned to their owners and will again become, at that time, subject to the same rates, fares and charges for

transportation as existed at the time the President, by proclamation, took federal control of such transportation systems, and the power to initiate and prescribe fares, rates and charges will again be the same in the states and the Interstate Commerce Commission as existed at the time of the taking of federal control of such systems which powers were, as we have seen, suspended in the manner above stated during the time of war. At such time when such transportation systems are returned to their owners, if they be so returned, all state regulations and powers will be again revived and be of the same force and effect as they were at the time of the taking of federal control. The power of the state at the time of taking of federal control to prescribe fares, rates and charges was not repealed but merely suspended during federal control and, upon the termination of that, will again have the same force and effect as at the time of taking of federal control.

The Federal Control Act is one that conferred upon the President certain rights, authority and power with reference to initiating rates and charges for transportation. If anyone had a just complaint with reference to rates, fares and charges initiated by the President, the act itself prescribed a definite remedy. If complaint were made that the rates and charges and fares were unreasonable, the Interstate Commerce Commission had full power and authority to examine into the complaint with reference to the unreasonableness or unjustness of any fare, rate or charge and it could, after a hearing upon the complaint, fully determine as to the reasonableness or justness of the fare, rate or charge. Thus there was a complete remedy. Where a statute or an act creates a right, authority or power and provides a remedy for its enforcement and provides a remedy for those who may claim to be injuriously affected by it, such remedies are
71 generally held to be exclusive. United States v. Stevenson, 115 U. S. 190; Globe Newspaper Company v. Walker, 210 U. S. 356; Dollar Saving Bank v. United States, 19 Wall. 227.

It is conceded the rates and charges fixed by Order No. 28 have not been scheduled nor filed with the state railroad commission before they were put into effect, as Section 4725 of the Revised Code of North Dakota of 1913 provides; that the schedule of fares, rates and charges under Order 28 were only filed as a matter of courtesy for the use and information of the board of railroad commissioners of North Dakota and not in compliance with Section 4725.

The main contention of plaintiff is that there is no authority for the President under the Federal Control Act to increase rates, fares and charges on transportation which is wholly intrastate. In finally disposing of this matter, as we view it, it must be presumed that the President and every subordinate officer or federal employee acting under his authority, in executing the powers conferred upon him by the Federal Control Act were, at all times, in the execution of such powers, acting in the highest of good faith. It must also be presumed that the President did not initiate a higher fare, rate or charge than was necessary to maintain the efficiency of the transportation systems taken under Federal control and that it was necessary to fix such rates and charges as he did, for the purpose of transporting troops and war material and for the further purpose of maintaining

the efficiency of the transportation systems so that all transportation immediately connected with war purposes might be promptly carried on as well as all other transportation.

The twenty-five per cent increase of freight rates on intrastate commerce in all of the states, we can readily understand would amount to many millions of dollars. It would constitute a substantial part of the amount of revenue raised by the twenty-five per cent increase on all freight. It would constitute a considerable share of the means and funds whereby transportation of every kind could be made efficient. It would constitute a large fund which would assist in paying the hundreds of millions of dollars of increased wages to
72 federal employees of the transportation systems while under federal control and without this large amount the operation of the transportation systems under federal control would be impaired and their efficiency for all purposes decreased, and thus affect the transportation of troops, war materials and government supplies. It seems clear that the act in question is one conferring upon the President war powers. The language of the act is clear and it confers upon the President the exclusive power to initiate all rates upon the transportation systems of the continental United States during the time of federal control and during that time, his right to do so cannot be limited by the state. It is clear that such power included the right to initiate all rates, both on interstate and intrastate commerce, during federal control of the transportation systems and that all such rates should become effective by filing the same with the Interstate Commerce Commission upon one day's notice. If the conclusion at which we have arrived is correct and we think it is, the contentions of the plaintiff cannot be upheld. The writ of mandamus issued by this court should be quashed.

RICHARD H. GRACE.

73 STATE ex Rel. LANGER

v.

DIRECTOR GENERAL.

BRONSON, *J.*:

I dissent. In my opinion the majority opinions wholly ignore the fundamental considerations of law involved in this action. If mandamus is awarded and maintained now, it ought to have been awarded and made effective when the order was first promulgated. During the crucial period of the great war, now ended, this order was in effect and in force without complaint, and with the acquiescence of this state.

The opinion of Judge Birdzell is based upon the broad proposition that the regulatory powers of the state over Intra-state rates were not suspended by the Act of Congress of Mar. 21, 1918, by reason, particularly, of the provisions of Sec. 15 thereof.

Readily, the court may arrive at such a conclusion when it assumes as a premise that the exercise of this war power by Congress

is the exercise of the Common Law Power of Regulation, and not the exercise of that higher power, the sovereign right to operate in war times a governmental instrumentality for war purposes and to prescribe the rates thereof. The purpose- for which the railroads were taken and rates prescribed are disclosed not only by the terms of the Act, but by the actual purposes for which, in fact, the railroads were used and the rates were prescribed.

Upon a priori reasoning, as I view it, Justice Birdzell holds that the intent of Congress in the Act was to prescribe a method of initiating Common Law reasonable rates, by the President instead of by the Railroads themselves, based upon the old theory that the charge made to the public must be reasonable and not discriminatory. It is necessary through this technically narrow construction to virtually read into the Act, Sec. 10 thereof, the following, "the President may initiate Interstate rates, fares, charges etc.," and, also, to virtually read into such Act, in Sec. 15 thereof, "that nothing in this Act shall be construed to amend, repeal, impair or affect the existing laws or powers of the State in relation to taxation, regulation
74 of rates, or the lawful police regulation etc." Congress might have so legislated; but it did not so legislate. It gave to the President direct authority to initiate rates; the term used is broader than Interstate rates. See Employers' Liability Cases, 270 U. S. 463, 500. From the very force of the circumstances then existing with this nation involved in a mighty struggle, in war time, it would seem perfectly obvious that the President, if he were to initiate any rates at all, must initiate rates that applied to both Interstate and Intra-state Commerce. Otherwise the power might as well not have been conferred.

At the time the act of March 21st, 1918 was enacted Congress recognized that certain transportation systems then were being operated as Federal instrumentalities under the terms of a proclamation of the President by which state regulatory powers might be or were subordinated. It knew then that the President through the Director General was exercising the power to route freight and that this necessarily included the power to change the rate to shippers. This regulatory power, if exercised, applied to both interstate and intrastate shipments. In such act of March 21st, 1918 Congress specifically required the Commerce Commission to give due consideration to the fact that the transportation systems then were being operated under a unified and co-ordinated National control and not in competition. In the Minnesota rate case, (230 U. S. 352, 417) the U. S. Supreme Court in considering the then Federal Statute concerning the powers of the Commerce Commission, stated, "Neither by the original act nor by the amendment did Congress seek to establish a unified control over interstate and intra-state commerce." In such act Congress further required the Commission to give due consideration to the certificate of the President, when made, that increased railway opration revenues are necessary in order to pay the expenses of Federal control and operation, etc., to the carriers operating as a unit. Although Congress retained the machinery of the Commerce Commission to preserve the reasonable and just character of Federal rates, as

much as possible, it nevertheless appears reasonably clear that Congress recognizing the exclusive Federal control in operation,
75 both interstate and intra-state then existing, meant and intended to give a corollary and additional war power of exclusive rate making over such systems under Federal control by which alone a unified and co-ordinated national control and operation could be effected. There is no question that the President has so interpreted such power and this executive interpretation should not be lightly considered. Justice Birdzell attacks in his opinion the reasonableness of the rate promulgated as applied to Intra-state Commerce and holds that prima facie, it is discriminatory, and therefore not justified. This argument begs the very question upon which the logic of his decision is founded, namely that the power exercised, is the power to regulate rates in Interstate Commerce as a Common Law power; he argues that the rate promulgated does not purport to be promulgated for the purpose of obviating discrimination in Intra-state Commerce; he must concede that it was, in fact, applied to both Interstate and Intra-state Commerce. If such power be the sovereign power in war times to prescribe rates, the regulatory power of the States does not obtain; if it be as contended by the majority opinion, the power to regulate the Common Law obligation of carriers concerning rates, then no attempt by any one has been made to subject these rates, so promulgated, to review before the Commission which has jurisdiction thereof. Surely, under the authorities quoted in the majority opinion, Congress had authority to grant to the President and the Interstate Commerce Commission the right to initiate, or review a Common Law rate in Interstate Commerce and to give authority to the Interstate Commerce Commission and the President, as the initiating power, to so prescribe an Intra-state rate which would not, by its terms, or by its effect, serve to interfere with, or impede Interstate Commerce.

It is also worthy of consideration to note that under the State Law, (Art. 21, of Ch. 14, G. L. 1913) the Railroad Commissioners of the State simply review, investigate, or determine a rate theretofore established by the common carriers. Even under the State law the common carriers initiate a rate except statutory prescribed maximum rates. The whole act looks to an exercise of jurisdiction over
76 a private corporation operating a railroad as a common carrier. Now, either under the State Act, or under the present Federal Act can such private corporation, for instance, the defendant railroad herein, initiate a rate, or file a schedule? How, further, under the State Law is any jurisdiction of any kind conferred over or concerning the President in the exercise of his power to prescribe rates? Are we to understand from the majority opinion that it is now the duty of the private corporation owning the railroad, but not having the control or the operation of the same, to initiate intrastate rates within the State, and the duty of the President to initiate rates over the same railroad within the State upon Interstate Commerce?

The opinion of Justice Robinson, by reason of which only the sanction of the court is given for a writ of mandamus herein, needs little comment. It contains no legal discussion. It gives no con-

sideration to the war power of Congress or of the President, or of the necessities of this nation in a time of war to utilize under the war power, every resource of man and property in the nation. It is merely a diatribe attempting to ridicule our Federal Government for its action taken, and for its alleged lack of economy concerning the operation of railroads under Federal control in times of stress and of war necessity. It is rather unfortunate that it happens in this action, the court being so divided, that a writ of mandamus is awarded against our Federal Government, based upon an opinion, (which under the circumstances is the controlling factor), directed rather to a discussion of the faults of railway operation, and of principles of expediency, rather than of law and of the war powers and necessities of this nation in war times.

My views upon this matter are expressed in the following opinion prepared in advance of the majority opinions of the court now presented, and to the views therein expressed, I still adhere. They are therefore hereinafter set forth.

77 STATE ex Rel. LANGER

v.

DIRECTOR GENERAL.

BRONSON, *J.*:

This is an original proceeding instituted upon the relation of William Langer, the Attorney General, against the Northern Pacific Railway Co., and the Director General of Railroads, seeking a writ of mandamus from this court to enjoin the defendants from collecting or enforcing the schedule of freight rates, and passenger fares and charges promulgated, and put in force and operation by the Director General pursuant to general order No. 28, issued May 25, 1918, so far as the same applies to Intra-state Traffic in the state of North Dakota.

The petition of the relator in substance alleges: That the President of the United States assumed control of the Railroad in question, under the act of Congress, Aug 29, 1916.

That, pursuant thereto, on Dec. 26, 1917, the President issued his proclamation for Federal control, and created the office of Director General to operate the Railroads, and that they have been so operated through the Director General since Jan. 1st, 1918.

That, on Mar. 21, 1918, Congress enacted the Federal Control Act, providing for the compensation, operation, and rehabilitation of transportation lines.

That, on May 25, 1918, the Director General issued general order No. 28 whereby on June 10, 1918, certain increased passenger fares, and baggage charges, and on June 25, 1918, certain increased freight rates were promulgated, and put in force upon transportation lines, including the defendant Railway Co.

That, by reason thereof, freight rates in the state of North Dakota were increased 25% and passenger rates from 2½c. per mile to

3c. per mile. That the Constitution of this state, Sec. 82, provides for the location of a board of Railway Commissioners, and that such board always, in this state, has exercised supervision and con-
78 trol over transportation systems operating in, and through the state as to intra-state rates and service. That Sec. 4725, C. L. 1913, provides that no Railway corporation may change its fares, rates, or charges for service without first filing such schedule of fares, rates, and charges with such board, ten days before the same became effective, and that the Railway Co. therefore, pursuant to such statute had filed a schedule of fares, rates and charges with such board, and that no petition of complaint was filed with the board by such Company since such date, asking for any increase in such rates within the state of North Dakota: that the schedule of rates so promulgated, and so put in force by the Director General are without authorization pursuant to the acts of Congress, and the proclamation of the President, and that the same do not affect the Government transportation of troops, war materials or Government supplies, or the issue of stocks and bonds; that the same are unreasonable and excessive and constitute an illegal burden upon the patrons of the Railroad Co.; that they are against the public welfare, convenience and business interest of the state and contrary to the law of the state.

The answer and return of the Director General admits that the Railway Co. owns the transportation line involved, and that it is an instrumentality both of state and intra-state commerce: it specifically denies that the company has operated its system since Dec. 25, 1917. It specifically alleges that the Director General has exercised possession and control over the transportation line involved pursuant to the acts of Congress and of the President of the United States. It specifically alleges that the Director General, pursuant to general order No. 28 put into full force and effect and applied the said schedule of rates and charges, and specifically denies that the Railway Co. did put the same in force and effect to apply to intra-state business in North Dakota; it specifically alleges that on April 6, 1917, the Federal Congress declared a state of war to exist between the United States and the imperial German Government; that pursuant to gen-
79 eral order No. 28, the Director General, having duly filed the same with the intra-state Commerce Commission, made effective the increased rates, fares and charges, provided in said order between points in North Dakota as well as between other points along its line, and that the same are still in effect and force and the transportation line in question has been and is now conducted, and the collection of such rates, fares, and charges has been made, by and in the name of the Director General of Railroads.

The Railroad Company interposed a separate answer or return alleging, in substance, that since Dec. 28, 1918, the possession and control of its transportation system has been under the President of the United States, and that all of its officers, directors and agents are under the direction of the United States Government, and not of the Railroad, and further that it did not put in force or effect the

schedules complained of, and that the same were so put into effect under the sole authority of the Director General.

Upon these pleadings of the parties, the only issues presented to this court are the questions of law that arise upon such pleadings. There is no question presented to this court for its determination as to whether the schedules in force are in fact excessive or unreasonable: nor is there any question presented of discriminatory acts by the Director General, or the Railway Co. in operating the transportation line under general order No. 28. There is likewise no question presented to this court concerning its jurisdiction to grant the relief sought, so far as it might be contended that the acts in question are those of the Director General, and not those of the carrier, for the reason that the Director General expressly wa-ves this question. The proceeding therefor- is before this court upon its merits upon the sole question of law, to wit: The legal authority of the Director General of Railroads to maintain in force and effect the schedule of increased rates, charges and fares promulgated upon and
80 effecting intra-state traffic in the state, contrary to the law of the state, without the supervising control or direction of the board of Railroad Commissioners.

The century old controversy of the rights of Federal Government and of the state in the exercising of their respective sovereign functions is again involved.

In determining the exercise of the power complained against herein, the following questions present themselves for consideration:

1. The power of Congress to authorize the Federal control and operation of the Railway Transportation lines as assumed.

2. The authority of Congress to prescribe or regulate rates on such transportation systems so taken.

3. Whether the power granted to the President to initiate rates is a delegation of legislative power.

4. Whether Congress, if it did possess such powers, expressly exercised the same to create a Federal agency for purposes of operation and rate making.

5. The power of the State to exercise, under its laws and police regulations, the rate making power over intra-state traffic upon railways under Federal control.

6. Whether the emergency for which the Congressional acts were enacted has passed and the powers conferred thereunder are now ineffective.

The legal consideration of these questions *are* determinative of the issue presented in this proceeding: They will therefore be considered separately.

1. The Authority of Congress to assume control of Transportation Lines:

It will scarcely now be denied that Congress has the power to enact legislation to effect a Governmental control over the transportation line envolved. The state rather so conce-des the power: This power may be drawn from its powers, to declare war, raise and support armies and to make all laws necessary and proper therefor,

or from the power to regulate interstate commerce, or even,
81 to establish post roads. (Art. 1, Sec. 8 Const.)

Concerning these war powers, Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176, the court said:

"The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

In Pappens v. United States, (C. C. A.) 252 Fed. 55, the court said:

"Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such."

Under the power to regulate interstate commerce or to establish post roads, Congress has undoubtedly the power to construct, maintain or operate a transportation line.

In Wilson v. Shaw, 204 U. S. 24, an action brought to restrain the Secretary of the Treasury from paying out money in the purchase of property for the construction of the Panama Canal etc., the Plaintiff contended that the Government had no authority to engage anywhere in the work of constructing a Railway or Canal. Justice Brewer, in holding that the decisions of the Court were to the contrary, quoted from California v. Pacific Railway Company, 127 U. S. 1, 39, as follows: "It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accomodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consider-
82 ation of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of

course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as Federal corporations."

So, in Luxton v. North River Bridge Company, 153 U. S. 525, Justice Gray stated as follows:

"Congress, therefore, may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the States. McCulloch v. Maryland, 4 Wheat. 316, 411, 422; Osborn v. Bank of United States, 9 Wheat. 738, 861, 873; Pacific Railroad Removal cases, 115 U. S. 1, 18; California v. Pacific Railroad, 127 U. S. 1, 39. Congress has likewise the power, exercised early in this century by successive acts in the Cumberland or National road, from the Potomac across the Alleghanies to the Ohio, to authorize the construction of a public highway connecting several States. See Indiana v. United States, 148 U. S. 148."

Justice Brewer, with reference to the contentions of the plaintiff that these decisions were obiter dicta, stated that plainly they were not; that they announced distinctly the opinion of the Supreme Court on the question presented; that Congress had acted in reliance upon such decision in many ways, and, that the Court adhered to the principles stated. (204 U. S. 24.)

Concerning the war powers, it is stated in Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 176, as follows:

"The Constitution gives to Congress the power to declare war; to grant letters of marque and reprisal; to make rules concerning captures on land and water; to raise and support armies, to provide and maintain a navy, and to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.

The President is the Commander in Chief of the army and navy, and of the militia of the several States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrections, are not defined. The decision of all such questions rests wholly in the discretion of those to whom
83 the substantial powers involved are confided by the Constitution."

Concerning the authority of Congress to make all laws which will be necessary and proper to carry into execution the express powers granted, Chief Justice Marshall, in M'Culloch v. Maryland, 4 Wheat. 4. L. Ed. 605, stated:

"But we think the sound construction of the constitution must allow to the national legislature the discretion, with respect to the means by which the powers it confers are to be carried into execu-

tion, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adpated to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The U. S. District Attorney for this State, of counsel for the Director General, contends that the President could have taken over the railroads, as a war measure, without any acts of Congress, and that the State cannot interfere with his management or use of the road.

Congress, having ample Constitutional powers concerning the subject matter, it is unnecessary to consider the war power of the President to take such property without the authority of Congress. This question was raised in Civil War times when Congress enacted the statute authorizing the President to take over Railroads, and transportation lines whenever the public safety required. 12 Stat. L. 334; C. Haney Congressional History of Railroads, Vol. 11, 158.

84 #2. The Authority of Congress to Prescribe or Regulate Rates on Transportation Systems:

Does Congress possess the constitutional power to fix or prescribe rates of Federal making which may supersede or subordinate intrastate rate regulations? A discrimination may be drawn between the powers of rate making and of operation; they may be classed, in many respects, as separate and distinct functions. The power to operate, however, with respect to the effciency of operation, and the prompt movement of traffic may depend largely upon the rate prescribed: the rate prescribed may facilitate, deter or even prohibit the movement of certain traffic. Revenues, when dependant upon rates may vitally affect the operation of transportation systems. If Congress possesses the power to control or operate a railroad transportation system, it must necessarily be conceded that it possesses, likewise, the power to prescribe or to fix a method of fixing rates to be charged for the service rendered in operating a governmental instrumentality. Whether this power flows from the exercise of the Constitutional War Power, or from the exercise of the Constitutional power to establish post roads, or regulate Interstate Commerce, in any case, the authority necessarily exists as essentially implied in the execution of the power. It exists, concededly so, in the Federal operation of Post Offices, and of the Parcel Post. (In re Jackson, 6 Otto. 727, 24 L. Ed. 877.), in the control and management of the Panama Canal, (32 Stat. L. 481, 34 Stat. L. 51), and in various other Federal instrumentalities.

The question involved is not the power of regulation, but the power concerned with operation. The common law obligation is imposed upon the common carrier to make charges reasonable and just. This obligation is subject to regulation by the sovereign power; the legislative sovereign will may prescribe this common law obligation, a rule of conduct, and fix a rate. (Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77, 87.) In the above case Justice Waite stated:

85 "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine

what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is "affected with a public interest, it ceases to be Juris Privati only." This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise De Portibus Maris, 1, Harg. L. Tr., 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

See Watkins on Shippers and Carriers Sec. 61 (2nd Ed.).

When, however, the public itself, through its government assumes management, or exercises proprietary control over such property as an instrumentality, or agency of the Government, the very reason for the regulation disappears; there then exists a merger of the interests of the owner and his patrons. Then, in theory of law, the property, theretofore privately owned and operated but affected with a public interest, subject to regulation for the common good, is now operated and maintained as a governmental agency for the common good. The legislative will may then prescribe a rate for the governmental service to be rendered regardless of the Common Law obligations of a Common Carrier; The exercise of such power becomes similar to the power to tax; The Federal Constitution does provide that duties, imposts and excises shall be uniform; it contains no inhibition against discriminatory rates; the equality clause of the 14th. amendment applies to States only. It is therefore, readily appreciated that the power of the States to prescribe or regulate the rates intra-state, of a common carrier privately owned and operated is entirely a different power than the power of the State to prescribe or regulate rates upon or over a Federally owned or operated common carrier. In observing the distinction, no one will

86 contend that this State, under its right to regulate rates, possesses any authority to regulate, or review the charges made by the Federal Government, for carrying, or delivering a letter, or parcel post package through the United States mail intra-state. The argument presented by the State that the police powers of the State cannot be surrendered and that the supervising of Railroad rates is a police regulation within the police powers, does not apply to the question presented. It is unnecessary to consider whether the exercise of the rate making power is within the police power, for clearly the police powers of the State do not apply to a Federal instrumentality when Congress has specifically legislated concerning the exercise thereof. Furthermore, under the power to regulate interstate commerce, the plenary power of Congress concerning such matters, to the exclusion of the rights of the State, is recognized in the cases cited by the State.

In the Minnesota Rate Case, 230, U. S. 352, the right of the State to exercise its regulatory powers over intra-state rates was expressly based upon the principle that Congress had not taken from the State this power. In the Shreveport case; 234, U. S. 234, the principle was recognized that Congress had paramount power with reference to interstate Commerce and the regulation thereof, but that this did not mean that Congress possessed any authority to regulate the internal affairs of a State.

Likewise, in the Keokuk case, 235 U. S. 493, and in the Caldwell case, 244, U. S. 617, the power of the Interstate Commerce Commission was restricted within the limits which requires a definite showing of interference with the interstate rate prescribed.

Likewise, in the Union Pacific cases, (9 Wall. 579, 75 U. S. 792) (85 U. S. 5, 21 L. Ed. 877) (3 Fed. 106) (25 Fed. 728) the right of the State to tax the property of the Union Pacific Railway Co. to subject its property to the right of eminent domain of the State, or to affect a physical connection with another Railroad, was conceded upon the basic holding that such railway was a private corpo-

87 ration, with property of its own, and that it was not a Federal instrumentality, except as Congress had made it so for special purposes, and it not being shown that the action of the State interfered with any of these specific purposes, which Congress had required it to fulfill, the sovereign right of the State could act.

It clearly follows, therefore, that, under the Federal Constitution, and the interpretation made concerning the powers granted to Congress by the Courts, Congress does possess the authority to prescribe the rate to be charged for services rendered by a common carrier as a Federal Instrumentality.

88 #3. The authority of Congress to delegate the rate making Power to the President:

It would seem to be obvious that if Congress had the power to prescribe a rate for service rendered by a government instrumentality, it possesses the right to prescribe the means by which it shall be determined: Heretofore it has constituted the Interstate Commerce Commission, as a body, to consider the reasonableness of service charges of common carriers in interstate commerce: This body has the power to determine whether a given or proposed rate is reasonable or discriminatory: Under the act of Aug. 10, 1917, Congress has imposed directly additional powers upon such Commission to grant preference on priority in transportation of traffic, and to fix just and reasonable rates for persons or property in carrying out the directions and orders of the President. This power, so given to the Commerce Commission is, of course, not a delegation of legislative power: This power, of course, the Congress could impose upon the President or the Director General, as well as upon the Commission. (Interstate Commerce Commission v. Railway Co., 167 U. S. 479, 42 L. Ed. 243.) In United States v. Grimaud, 221 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563, the court said, concerning the delegation of legislative power as follows:

"From the beginning of the Government, various acts have been passed conferring upon executive officers power to make rules and regulations,—not for the government of their departments, but for

administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions "power to fill up the details" by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done.

Thus it is unlawful to charge unreasonable rates or to discriminate between shippers, and the Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 54 L. Ed. 280, 30 Sup. Ct. Rep. 155; Interstate Commerce Commission v. Chicago R. I. & P. R. Co. 218 U. S. 88, 54 L. Ed. 946, 30 Sup. Ct. Rep. 651. Congress provided that after a given date, only cars with drawbars of uniform
89 height should be used in interstate commerce, and then constitutionally left to the Commission the administrative duty of fixing a uniform standard. St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 287, 52 L. Ed. 1064, 28 Sup. Ct. Rep. 616. In Union Bridge Co. v. United States, 204 U. S. 364, 51 L. Ed. 523, 27 Sup. Ct. 367; Re Kollock, 165 U. S. 526, 41 L. Ed. 813, 17 Sup. Ct. Rep. 444; Butterfield v. Stranahan, 192 U. S. 470, 48 L. Ed. 525, 24 Sup. Ct. Rep. 349, it appeared from the statutes involved that Congress had either expressly or by necessary implication made it unlawful, if not criminal, to obstruct navigable streams; to sell unbranded oleomargarine; or to import unwholesome teas. With this unlawfulness as a predicate, the executive officers were authorized to make rules and regulations appropriate to the several matters covered by the various acts. A violation of these rules then made an offense punishable as prescribed by Congress. But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect.

As heretofore discussed the power to prescribe a service charge for a government instrumentality, is not the common law power of determining a reasonable charge: It is the sovereign power to prescribe the charge, or to fix the means of accomplishing the same: It is similar to the power to impose tariff duties: The right to the President to impose a tariff on wheat: It is analogous to the authority granted the President to fix the price of wheat under the food control acts. In fact, under present war measures many similar duties have been imposed or conferred upon the President, viz: Freight rates on vessels,—Act July 18, 1918.

Clearly this power, not a power to legislate a rate, not to determine the reasonableness or discriminatory character of a rate, is a right that may properly be granted, within proper bounds, not transgressing the delegation of a legislative power, to the president. Marshall Field & Co. v. Clark, 143 U. S., 649, 36 L. Ed. 310.

90 #4. Whether Congress, if it did possess such powers, expressly exercised the same to create a Federal Agency for purposes of operation and rate making:

The Act of Aug. 29, 1916 (39 Stat. 645), provides:

"The President in time of war, is empowered through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

It is apparent that Congress by this act intended to exercise and did exercise its war power. The paragraph in question was incorporated into the Army Appropriation Act; evidently the enactment was intended to provide for our troops in Mexico and to provide full authority in the President in case of any difficulties with Mexico. Unquestionably, it gave to the President the direct authority in time of war, to take possession, and assume control of the transportation lines involved.

On April 6, 1917, a state of war was formally declared to exist by Congress, between the United States and the Imperial German Government. On Dec. 7th, 1917, Congress authorized and directed the President to employ the entire naval and military resources of the United States, and the other resources of the United States to carry on the war, and to bring the conflict to a successful determination. On Dec. 28th, 1917, the President of the United States, pursuant to the Act of Aug. 29, 1916, and the resolutions of Congress declaring war on Germany and the Austro-Hungarian Government, did take possession and assume control, of transportation lines including the transportation line involved herein, and he expressly directed that the possession, control, operation and utilization of such systems of transportation should be exercised through the Director General. His proclamation further provided that such systems should be utilized for the transferring and transportation of troops, war
91 material and equipment, to the exclusion, so far as may be necessary of all other traffic thereon; that so far as such exclusive use be not necessary or desirable, such systems of transportation should be operated and utilized, in the performance of such other services as the National interests may require, and of the usual and ordinary business and duties of common carriers. The proclamation further provided that:

"Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such."

Under this proclamation and the authority theretofore conferred, the possession and control of railways, as outlined in the proclamation,

was taken. It can scarcely be contended that the President did not properly determine an urgency and immediate necessity for so doing. By this act of the President the private property of the carriers became subject to the public use required to meet the public necessities then existing. Under this assumption of power the transportation systems passed under governmental operation. There can be little question that then and there they became Federal Instrumentalities to the extent of the purpose for which control and possession of the same were taken. As such, in operation in the manner in which the train should be operated, traffic should be handled, passengers carried, merchandise transported, they became subject to the orders of the Director General and in so far as any statute of any State or of any order of any Railroad Commission of any State served to prescribed otherwise, or was in contravention thereof, the same was subordinated or suspended. These principles obtain not only from the nature of the power conferred upon the Federal Government to carry on war, but also from the reciprocal duty of the States to aid and assist the Federal Government, in times of war, by subordinating every State agency which may serve to interfere with the successful prosecution of the war, and of the enforcement of the war powers. Under this act, providing the assumption of control, there was no attempt to legislate or exercise the rate making power.

92

Under the Act of Mar. 21, 1918, Congress recognised that the President had, in time of war, taken over the possession and use, the control and operation of certain transportation systems: It provided for an annual compensation to the Railway corporations equivalent to their respective average, annual Railway operating income, for the three years, ending June 30, 1917: It provided that Railway operating income accruing during the period of Federal control in excess of such compensation should remain the property of the United States. It further provided that taxes assessed under Federal or any other governmental authority, for the period of Federal control, on the property used under such Federal control, or on the right to operate as a carrier, or on the revenues derived from operation should be paid out of revenues derived from Railway operations while under Federal control excepting that war taxes assessed under the Act of Oct. 3, 1917, or subsequent Acts should be paid by the carrier out of its own funds, and, also assessments for public improvements, or taxes assessed on property under construction. The act also provided that the President might execute any of the powers conferred with relation to Federal control through such agency as he may determine, and that he may fix a reasonable charge for the performance of services in connection therewith, and may avail himself of the advise, assistance and co-operation of the Interstate Commerce Commission: that furthermore, during the period of Federal control, whenever in his opinion the public interests requires, he, the president may initiate rates, fares and charges, classifications, regulations and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations and practices

shall not be suspended by the Commission pending final determination. The act further provides that:

93 "Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations or practices, or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal Control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

The Act also provides the sum of five hundred million dollars of Federal monies, which together with the funds available from operating income shall be used as a revolving fund for the purpose of paying the expenses of Federal control, and compensation to carriers, and providing equipment etc., and further that monies and other properties derived from the operation of the carriers during the Federal control are declared to be Federal property. The Act further provides that this Federal control shall continue for, and during the period of the war, and for a reasonable time thereafter, not exceeding one year and nine months after the date of the proclamation by the President of the exchange of ratifications of the Treaty of Peace. It grants, however, to the President the right to relinquish Federal control at any time he should deem such action needful, or desirable. This act is expressly declared to be an emergency declaration enacted to meet conditions growing out of the war.

It is at once seen that this act directly authorizes the exer-
94 cise of the rate making power by the President over transportation lines under Federal control. There can be no question of the intent and purpose of Congress to so do from the very express words of the act. A means and a method is prescribed for

fixing rates to be charged throughout the agency of the President and the established Interstate Commerce Commission.

It may perhaps be contended that the act granting the power to initiate rates and providing that they shall be just and reasonable and subject to review, or consideration by the Interstate Commerce Commission, is drafted analagously to the Interstate Commerce Act creating and defining the powers of the Interstate Commerce Commission in the investigation and determination of the reasonableness of rates in interstate commerce. That such act simply incorporated the common law obligation imposed upon common carriers to make all rates reasonable and just and that the power of the Commission has been confined by the act and by the decisions of the courts to a determination of the reasonableness and the equality of a given rate. That the power to prescribe a rate is a legislative function, the power to determine its reasonableness, a judicial function. That under the Commerce Act the Railways were authorized to initiate rates in interstate commerce, Congress not attempting to prescribe a rate but providing a method for investigating and determining the reasonableness or discriminatory character of the same through the Commission. That, in the act in question, Congress has not attempted to prescribe a rate but has simply transferred from the Railways to the President the power to initiate a rate and has left with the Commerce Commission the power there-fore possessed to determine its reasonableness. That this displays an intent and understanding to apply the same to interstate commerce, alone over which the Commerce Commission alone has jurisdiction. This contention, somewhat plausible from the analagous means used in the Commerce Act and the Act of March 21st, 1918, to initiate and determine
95 rates over common carriers, is to be answered not by a comparison alone of similar language used but through the intent and purpose of the act in connection with the emergency war situation existing and the public needs and demands occasioned thereby.

It does not follow that Congress simply intended to prescribe legislation for initiating rates, applicable only interstate, upon a Federal instrumentality, because it constituted as Board of Review, to act with the President, the Commerce Commission whose powers theretofore were confined to a determination of the common law obligation of common carriers.

The Act of March 21st, 1918, specifically provides for a method of prescribing rates through the action of the President and the Commerce Commission, over common carriers under Federal control. The Commerce Commission are specifically instructed that due consideration be given to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition. They are further directed to take into consideration the certificate of the President, when made, that increased railway operation revenues are necessary, in order to pay the expenses of Federal control and operation fairly chargeable to railway operating expenses and to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment and compensation to the carriers operating as a unit. True, the Commission are authorized to

make findings and orders as are authorized by the amended act to Regulate Commerce. The language employed, in this regard, is not clear. The intent and purpose of the whole act and the object sought to be gained in the war emergency, however, are clear. A Federal instrumentality was created; the control is direct; the revenues received are government property; the appropriations made out of public funds *is* for the public purpose of Federal operation. The persons employed as officers, agents and employees upon such railways are considered employed in the service of the United States. The control of all traffic is directly subject to the orders of the
96 President. It is certainly apparent that these powers conferred upon the President and the Commerce Commission to initiate or review rates upon and over such Federal instrumentalities *is* not the power to initiate or review a rate that must be just and reasonable under the common law obligation of common carrier to passengers, shippers, or to the public.

The intent and purpose of the Director General in this regard is well shown in the preamble to general order No. 28 which reads as follows:

"General Order No. 28."

"Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and

Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an act of Congress approved August 29, 1916, entitled 'An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' shall be made by initiating the necessary rates, fares, charges, classifications, regulations and practices by filing the same with the Interstate Commerce Commission under authority of an Act of Congress approved March 21, 1918, entitled "An Act to provide for the operation of transportation systems while under Federal control, for just compensation of their owners, and for other purposes."

Now, therefore, under and by virtue of the provisions of the said act of March 21, 1918, it is ordered that all existing freight rates, passenger fares, and baggage charges, including changes heretofore published but not yet effective, on all traffic carried by all said railroad and steamship lines, under Federal control, whether the same be carried entirely by railroad, entirely by water, or partly by railroad and partly by water, except traffic carried entirely by water to and from foreign countries, be increased or modified, effective June 25, 1918, as to freight rates and effective June 10, 1918, as to passen-

ger fares and baggage charges, to the extent and in the manner indicated and set forth in the 'Exhibits' hereto attached and made part hereof, by filing schedules with the Interstate Commerce Commission effective on not less than one day's notice.

Given under my hand this 25th day of May, 1918.

W. G. McADOO,
Director General of Railroads."

97 Furthermore, during the continuance of the war, under the Act of Aug. 10th, 1917, heretofore mentioned, powers and duties have been imposed upon the Interstate Commerce Commission, in connection with the war powers of the President, apparently beyond their ordinary powers of determining the reasonableness or equity of rates of common carriers, privately owned and operated.

It is apparent that this act directly authorizes the exercise of the rate making power by the President over Transportation lines under Federal control. A means and a method is prescribed for fixing rates to be charged through the agency of the President and *they* already established Interstate Commerce Commission.

Although the act provides that the rates shall be reasonable and just and although it provides for a method of complaint and review of the same through the Commission, it is evident that this power so conferred upon the President is not the sole power theretofore possessed by the common carriers to initiate a rate that was just and reasonable to the shippers and for the public: The Act from its very provisions, intent and purposes, discloses a purpose to confer a power upon the President to prescribe rates, to be just and reasonable and to be subject to review it is true but, nevertheless an authority, in the operation of a governmental instrumentality, for either of the following purposes: To provide for a deficit in the operating revenues and to secure the Government against loss under its guarantee to the carriers, or, to raise revenues for the Government under the clause which provides that excess revenue shall be Government property.

In either case, the considerations that obtain concerning the common law obligation of carriers to maintain a just and reasonable rate do not apply.

It is also evident that the President through the Director General, pursuant to General Order No. 28, has exercised this specific power granted to him, and for the purposes, in part at least, as above stated: The order has been made applicable to all interstate and intra-state traffic under Federal control: There is no difficulty in understanding the meaning and intent of the order.

98 In our opinion, for the purposes of war, and the legislation enacted to enable the President to perform the high duties of his office, to carry the war to a successful determination, he possessed the specific power and authority to prescribe and make effective the rates promulgated in such General Order.

99 #5. The power of the State to exercise its rate making power over intra-state traffic upon railways under Federal Control:

Sec. 15, of the Act of Congress of March 21st, 1918, provides as follows:

"That nothing in this act shall be construed to amend, repeal, impair or effect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

The State contends that this section expressly reserves to the States its authority concerning the rate making power over intra-state traffic: that it discloses a specific intent on the part of Congress to not inhibit the application of the State laws concerning rates, if the same do not interfere with the Governmental purpose for which the railways were taken: that it shows likewise, *as* specific intent to not interfere with the power of the State in matters of purely local concern within the State, that furthermore the particular use of the term in Sec. 15 "Police regulations" includes and means to include the regulation of rates intra-state. From the foregoing discussion of the principles applicable in the operation of the Railway under Federal control, it is evident that the contentions of the State cannot be upheld. The control, possession and management of the railway systems involved being for governmental purposes, and as a Governmental instrumentality, the power of the State heretofore existing to exercise rate making power, to impose and require reasonable charges for services rendered by a Common carrier performing a public service do not obtain; at least this is so — far as the act prescribes a power, which has been exercised inconsistent with the exercise of such power, likewise by the State. Otherwise, in the act, the specific power is granted to the President to initiate, and prescribe rates upon railways under Federal control in conjunction with the Interstate Commerce Commission. As heretofore stated Congress, under its war powers, had ample authority so to do. It is apparent that Sec. 15, concerning the powers of the State over
100 taxation and lawful police regulation may properly apply to the property of private carriers not devoted to Federal control, under the act, or even may apply to such property so taken under the Federal control except as otherwise the act inhibits the exercise by a State, of power concurrent with that of the President. The State contends that the term, "lawful police regulations," means the exercise of the police power of the State and that this police power of the State cannot be surrendered; Again it is deemed unnecessary to distinguish when a police regulation is the exercise of a police power, and when it is not. It is sufficient to say as heretofore stated, that if the instrumentalities in question are Federal agencies concerning which Congress, and the President has exercised their powers in the control, possession, and operation of the same, the police power of the State does not obtain; otherwise it may.

In Pappen v. United States, (C. C. A.) 252 Fed. 55, the defendants

were convicted of maintaining a House of Ill Fame within five miles of a military fort. Sec. 13 of the Act of May 18, 1917, Ch. 15, authorized the Secretary of war to suppress during the period of war Houses of Ill Fame within such distance from any fort or military camp etc. as he deemed needful. The defendants contended that the violation of the five mile rule as established by the Secretary of War was an invasion of the police powers of the State. The contention was denied, the court holding that Congress having acted under a Constitutional power pursuant to its war powers had full and plenary authority, and that furthermore the act was not a delegation of legislative power to an executive officer. It is inconceivable that at a time when every resource and energy of the nation was absolutely necessary to be devoted to our Federal Government in order to enable it to marshall every resource of man and property to carry on the war successfully, that the State, in the exercise of a so termed police regulation, had the power or the authority to prescribe a rate that might obtain over a Governmental controlled railway between two points in the State, or to
101 assert under its existing laws what merchandise should be carried and when it should be transported, or that it should compel under its existing laws a particular service to passengers or to property that might be detrimental or contrary to the Federal demands. If this authority or power of the State did not exist at times when the war was at its height, it does not exist now unless the emergency situation created by the act of Congress has in fact, passed.

Even though, as contended, it be conceded that the exercise of the rate making power of the State is a lawful police regulation of the State, and as such applicable under Sec. 15, of said Act, to intrastate traffic, nevertheless, such police regulations may well be considered, in view of his proclamation and the terms of the general order issued disclosing and determining an emergency in war times, to exist, to affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

Well might the regulatory power of the State concerning rates apply on intra-state traffic. If the President pursuant to the powers granted to him had deemed it unnecessary to initiate or prescribe a rate to apply to railways under such Federal control.

The contention of the State that the provisions of Sec. 10, of such act, which provides that actions may be instituted against the carriers affected by Federal control, and judgment rendered as theretofore provided by law, and that in any such action no defense may be made upon the ground that the carrier is an instrumentality or agency of the Federal Government, show that such systems are not Federal instrumentalities, cannot be upheld. Well might this provision be construed to permit an action at law, or in equity to be maintained as formerly without embarrassment to litigants by the defense of a Governmental agency. The Act itself and the control assumed show in fact, a control by the government for war purposes, and an administration in fact through Government revenues, an operation through Government officials and a rate making power

exercised through Governmental authority. Clearly upon the principles discussed herein the powers of the State over rate making on intra-state traffic does not apply to the transportation line involved herein, if the act, and the purpose for which it was passed are still effective.

102

103 #6. Whether the emergency for which the Congressional Acts were enacted has passed and the powers conferred thereunder are now ineffective:

The State contends that what Congress delegated as a war time necessity has quite another aspect when that emergency has passed. That the war emergency has passed. That President Wilson in an official address on Nov. 11th, 1918, told Congress that the war was in fact concluded; that he then said: "The war thus comes to an end; for having accepted these terms of armistice, it will be impossible for the German command to renew it." That the war has in fact ended: That the armistice accepted by the central powers amounted to an unconditional surrender, and the necessity for government rail control as a war measure has passed away.

Upon the legal issues presented to this court and the showing made therefrom, we are convinced that this contention cannot be upheld: There is no showing made to this court that Governmental operation is not still urgently needed in the demobilization of troops, the maintenance of the armistice terms, the transportation of government materials and supplies, and in the governmental problems involved in the establishment of peace and normal conditions following the actual cessation of hostilities.

The mere fact that an armistice has been declared does not in and of itself determine that the emergency war powers then being exercised pursuant to Congressional authority then cease. Congress in the Act has prescribed a limitation of time, to wit: one year and nine months following the Treaty of Peace, for the exercise of this Federal control: It has recognized therein the necessity of emergency war legislation continuing for a period of time after the termination of the war. In such matters, its discretion, as well as that of the President, is a matter necessarily involved in the plenary war powers conferred upon them concerning which the judiciary will not interfere unless in fact, it is demonstrated by proof, subject to judicial inquiry, that the necessity for the exercise of such war power does not exist.

104 In Stewart v. Kahn, 11 Wall. 493, 20 L. Ed. 178, the court said:

"The measures to be taken in carrying on war and to suppress insurrections are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it, inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress."

It therefore follows that the petition of the relator herein should be in all things dismissed. H. A. BRONSON.

105 [Endorsed:] File No. 3722. State ex Rel. Langer, Plaintiff and —, vs. Northern Pacific, Defendant and —. Opinion of Court, by Birdzell, J. Filed in court this 1st day of April, 1919. J. H. Newton, Clerk. Rehearing denied —— —, 191–.

106 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads, Defendants.

Judgment.

This cause having come on for hearing upon the complaint of the plaintiff and the answers of the Northern Pacific Railway Company and of Walker D. Hines, Director General of Railroads, on Tuesday, the 25th day of February, 1919, and the court having heard argument and duly considered the same, and this day filed its decision in said cause;

It is ordered and adjudged, that the alternative writ of mandamus heretofore issued herein be made absolute, and that the defendants be and they are hereby commanded to desist from collecting any fares, rates or charges for carrying passengers, freight and baggage between points wholly within the State of North Dakota, except the fares, rates or charges for said services, now on file in the office of the Board of Railroad Commissioners of the State of North Dakota.

Dated this 5th day of April, 1919.

[Seal Supreme Court, State of North Dakota.]

J. H. NEWTON,
Clerk of said Supreme Court.

107 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads, Defendants.

Assignment of Errors.

Now come the Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, plaintiffs in error, and pray that a writ of error in the above entitled cause may issue to the Supreme Court of the State of North Dakota to review a certain judg-

ment entered in said court on the first day of April, 1919, in favor of the above named plaintiff and against the above named defendants, and assign the following errors in the rendition of said judgment:

1. The court erred in holding that Section 10 of the Act of Congress of March 21, 1918, does not confer on the President original authority to initiate intrastate rates which would supersede preexisting rates prescribed by the State Legislature or other competent authority.

2. The court erred in holding that under Section 15 of the Act of March 21, 1918, preexisting intrastate rates continue in effect as lawful police regulations.

3. The court erred in holding that the term "police regulations," as used in said Section 15, embraces regulations of railroad rates and fares.

4. The court erred in entering judgment in favor of the plaintiff.

Wherefore, plaintiffs in error pray that said judgment be reversed and that the Supreme Court of North Dakota be directed to enter judgment in their favor, quashing the writ of mandamus and dismissing the application therefor.

Dated this 4th day of April, 1919.

CHARLES W. BUNN,
Attorney for Northern Pacific Railway Company.
CHARLES DONNELLY,
Attorney for Walker D. Hines,
as Director General of Railroads.

108 [Endorsed:] 3722. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Apr. 5, 1919.

109 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads, Defendants.

Petition for Writ of Error to the Supreme Court.

The Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, defendants in the above entitled cause, feeling themselves aggrieved by the judgment entered herein on the first day of April, 1919, come now by Charles W. Bunn and Charles Donnelly, their attorneys, and petition said court for an order allowing said defendants to prosecute a writ of error to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and that upon the giving of security in the sum of Five Hundred Dollars, all further proceedings in this court be suspended and stayed until the determination of said

writ of error by the Supreme Court of the United States. And your petitioners will ever pray.

Dated April 4, 1919.

CHARLES W. BUNN,
Attorney for Northern Pacific Railway Company.
CHARLES DONNELLY,
Attorney for Walker D. Hines, as Director General of Railroads.

Allowed.
A. M. CHRISTIANSON,
Chief Justice of the Supreme Court of North Dakota.

110 [Endorsed:] 3722. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Apr. 8, 1919.

111 In the Supreme Court of the State of North Dakota.

STATE OF NORTH DAKOTA ex Rel. WILLIAM LANGER, Attorney General, Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroads, Defendants.

Bond.

Know all men by these presents, that we, the Northern Pacific Railway Company, and Walker D. Hines, Director General of Railroads, as principals, and the National Surety Company of New York, as surety, are held and firmly bound unto the State of North Dakota in the full sum of Five Hundred Dollars ($500.00) to be paid to the said State of North Dakota; to which payment well and truly to be made, we bind ourselves and our successors jointly and severally by these presents.

Sealed with our seals and dated this 4th day of April, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

Whereas, lately, in a suit pending in the Supreme Court of the State of North Dakota, between the State of North Dakota on the relation of William Langer, Attorney General, as plaintiff, and the Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, as defendants, a judgment was rendered against said defendants, and said defendants having obtained the allowance of a writ of error to reverse said judgment, and filed a copy thereof in the office of the Clerk of said court, and a citation having issued, directed to the said State of North Dakota citing and admonishing it to be and appear at the Supreme Court of the United States at Washington within sixty (60) days from the date thereof;

Now, the condition of the above obligation is such, that if the said defendants shall prosecute their writ of error to effect and answer all damages and costs, if they fail to make good their plea, then the

above obligation to be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILWAY COMPANY,
By C. W. BUNN, *Its Attorney.*
WALKER D. HINES,
As Director General of Railroads,
By CHARLES DONNELLY, *His Attorney.*
NATIONAL SURETY COMPANY,
By D. I. YORK, *Its Attorney in Fact.*

G. E. JOHNSON,
M. FREDERICKSEN,
As to Surety.

The foregoing bond is hereby approved as a supersedeas, this 5th day of April, 1919.

A. M. CHRISTIANSON,
Chief Justice of Supreme Court of North Dakota.

112 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 4th day of April A. D. 1919, before me appeared D. I. York, to me personally known, who being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and said D. I. York, acknowledged said instrument to be the free act and deed of said corporation.

G. E. JOHNSON,
Notary Public, Ramsey County, Minnesota.

My commission expires Sept. 24, 1924.

113 [Endorsed:] 3722. Filed in the Office of the Clerk of the Supreme Court, State of North Dakota, Apr. 5, 1919.

114 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of North Dakota, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, between the State of North Dakota, on the relation of William Langer, Attorney General, plaintiff, and Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, defendants, wherein was drawn in question the validity of an authority

exercised under the United States, and the decision was against its validity, a manifest error hath happened to the great damage of the said defendants, as by their complaint appears,

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same in said court at Washington within sixty (60) days from the date hereof; that the record and proceedings aforesaid, being inspected, the Supreme Court may cause further to be done therein to correct that error what *is* right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 7th day of April, in the year of our Lord One Thousand Nine Hundred and Nineteen.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk of the United States District Court
for the District of North Dakota.

[Endorsed:] 3722. Filed in the office of the Clerk of the Supreme Court, State of North Dakota, Apr. 8, 1919.

115 UNITED STATES OF AMERICA, *ss:*

To the State of North Dakota ex rel. William Langer, Attorney General, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, D. C., within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of North Dakota, wherein Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. M. Christianson, Chief Justice of the Supreme Court of the State of North Dakota, this 5th day of April, in the year of our Lord, One Thousand Nine Hundred and Nineteen.

A. M. CHRISTIANSON,
Chief Justice of the Supreme Court
of the State of North Dakota.

Service of the foregoing citation, and the receipt of a copy thereof, admitted this 8th day of April, 1919.

WILLIAM LANGER,
FRANK E. PACKARD,
Attorneys for Defendant in Error.

116 [Endorsed:] 3722. Filed in the office of the Clerk of the Supreme Court, State of North Dakota, Apr. 8, 1919.

117 UNITED STATES OF AMERICA,
Supreme Court of North Dakota, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning same, including the original citation therein.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of North Dakota, at my office in the City of Bismarck, this 8th day of April, 1919.

[Seal Supreme Court, State of North Dakota.]

J. H. NEWTON,
Clerk of the Supreme Court of the State of North Dakota.

Endorsed on cover: File No. 27,062. North Dakota Supreme Court. Term No. 976. Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, plaintiff in error, vs. The State of North Dakota on the relation of William Langer, Attorney General. Filed April 11th, 1919. File No. 27,062.

In the Supreme Court of the United States.

OCTOBER TERM, 1918.

WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, AND NORTHERN PACIFIC RAILWAY COMPANY, PLAINTIFFS IN ERROR,

v.

STATE OF NORTH DAKOTA, EX REL, WILLIAM LANGER, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

MOTION TO ADVANCE.

Come now the plaintiffs in error and the defendant in error and jointly move to advance the above entitled cause and to set it for hearing at an early date. For grounds of this motion they show:

This is a writ of error to the Supreme Court of North Dakota (the highest court of that State) to review a final judgment commanding the Director General of Railroads and the Northern Pacific Railway Company to desist from collecting in North Dakota the increased intrastate rates and fares made effective in June, 1918, by an order of the Director General. The case presents the question of the authority of the Director General to increase or to interfere with rates, fares or charges established by State law or by the order of a State regulating tribunal.

The Supreme Court of North Dakota has decided against the authority claimed. Similar suits involving the same question are now pending in the courts of South Dakota, Nebraska, Iowa, Minnesota, and Washington; and other suits of like nature are threatened in various other States of the Union.

The case is one in which the United States are concerned, because the moneys collected under the rates attacked are declared by law to be the property of the United States. Infinite confusion and uncertainty must attend the operation of the railroads by the Government so long as this question remains unsettled, and the State courts assert the right to enjoin the collection by the Director General of rates prescribed by him. The case, therefore, is one of great general public interest, and pursuant to paragraph 5, of the twenty-sixth rule of this court, the Attorney General moves that it be advanced and heard promptly.

ALEX. C. KING,
Solicitor General.
JOHN BARTON PAYNE,
CHARLES DONNELLY,
For the Director General of Railroads.
CHARLES W. BUNN,
For the Northern Pacific Railway Company.
WILLIAM LANGER,
FRANK E. PACKARD,
For defendant in error.

APRIL, 1919.

○

JAMES D. MAHER,
CLERK.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 976.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS,

Plaintiffs in Error.

vs.

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY.

CHARLES W. BUNN,
For Northern Pacific
Railway Company.

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 976.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, As Director General of Railroads,

Plaintiffs in Error,

vs.

THE STATE OF NORTH DAKOTA, on the Relation of William Langer, Attorney General.

BRIEF OF NORTHERN PACIFIC RAILWAY COMPANY.

As the record shows, and as the judgment expressly states (R. 66), this case was heard upon the complaint and the separate answers of the Northern Pacific Railway Company and the Director General of Railroads. The averments of the answers are therefore to be taken as true; indeed

there has not been, nor could there be, any dispute about them, because they set forth only matter which the court knows judicially. They show that from December 28, 1917, to August 1, 1918, the Director General exercised possession and control of the transportation system belonging to the Northern Pacific Railway Company through the officers and agents of that Company, and that after August 1, 1918, he exercised such possession and control through his own officers and agents. Since December 28, 1917, the Northern Pacific Railway Company has had no possession or control of its railroad, nor did it have anything whatsoever to do with putting into force or effect the advanced rates, fares and charges complained of, all of which were filed and published under the sole authority of the Director General.

It is perfectly clear, therefore, that no case is made against the Northern Pacific Railway Company, and as to that Company the complaint should have been dismissed.

CHARLES W. BUNN,
For Northern Pacific Railway Company.

Office Supreme Court, U. S.
FILED
MAY 3 1919
JAMES D. MAHER,
CLERK.

No. 976.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

Brief of the Director General of Railroads

ALEX. C. KING,
Solicitor General;
JOHN BARTON PAYNE,
R. V. FLETCHER,
CHARLES DONNELLY,
For the Director General of Railroads.

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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 976.—October Term, 1918.

The Northern Pacific Railway Company and Walker D. Hines, as Director General of Railroads, Plaintiffs in Error,

vs.

The State of North Dakota, on the Relation of William Langer, Attorney General.

Brief of the Director General of Railroads

STATEMENT.

This is a writ of error to review a judgment of the Supreme Court of North Dakota directing the issuance of a peremptory writ of mandamus commanding the plaintiffs in error to desist from collecting for services wholly within the State any rates, fares or charges other than the fares, rates or charges on file in the office of the State Board of Railroad Commissioners. (R. 66). The following are the facts out of which the case arises:

August 29, 1916, Congress empowered the President in time of war to take possession and assume control of any systems of transportation and to utilize them to the exclusion, if necessary, of all traffic or transportation other than that of troops, war material or equipment (39 Stat. 645).

April 6, 1917, Congress duly resolved that a state of war existed between the United States and the Imper-

ial German Government, (40 Stat. 1), and on December 7, 1917, war was declared with Austria (40 Stat. 429).

December 26, 1917, the President, proceeding under the authority of the Act of August 29, 1916, took possession and assumed control of all systems of transportation within the boundaries of the United States, including the Northern Pacific Railroad.

March 21, 1918, an act known as the "Federal Control Act" (40 Stat. 451) was approved, providing for the operation of the systems of transportation thus taken over, and for the compensation of their owners.*

March 29, 1918, the President, by a further proclamation (R. 12)), empowered William G. McAdoo, Director General of Railroads, either personally or through such agencies as he might appoint, to exercise the powers and to do the things which the President had been authorized to do.

May 25, 1918, the Director General of Railroads made his General Order No. 28 (R. 14), directing that rates and passenger fares be increased; and pursuant to this order the increased rates and fares of which complaint is made were duly published and filed with the Interstate Commerce Commission. They were not filed with the Board of Railroad Commissioners of North Dakota (except for purposes of information), and the laws of that State regulating the procedure to be followed by common carriers in increasing rates, fares and charges were not observed.

February 14, 1919, the Attorney General of North Dakota commenced this proceeding in the Supreme Court of North Dakota against the Director General of Railroads and the Northern Pacific Railway Com-

*For the convenience of the court, copies of the material part of the Act of August 29, 1916, and of the whole of the President's proclamation of December 26, 1917, and the Act of March 21, 1918, are appended to this brief.

pany, and asked that they be enjoined from continuing in effect the rates published pursuant to the Director General's order (R. 10). Separate answers were filed by the defendants, setting forth in substance the facts above stated (R. 11-17). The case was heard on complaint and answers February 25, 1919. April 1, 1919, the court rendered its decision upon which was entered the judgment which this writ of error brings under review (R. 20-33). A separate concurring opinion was filed by Mr. Justice Robinson (R. 34-36). Two of the five justices of the court dissented (R. 37-65).

ASSIGNMENT OF ERRORS.

1. The court erred in holding that Section 10 of the Act of Congress of March 21, 1918, does not confer on the President authority to initiate intrastate rates superseding pre-existing rates prescribed by state authority.

2. The court erred in holding that under Section 15 of the Act of March 21, 1918, pre-existing intrastate rates remained in effect as lawful police regulations.

3. The court erred in holding that the term "police regulations", as used in Section 15, embraces regulation of railroad rates and fares.

4. The court erred in entering judgment in favor of the plaintiff.

ARGUMENT.

1. Congress was empowered by the Constitution to vest in the President or in the Interstate Commerce Commission control over intrastate rates and fares.

The court below concedes this proposition (R. 25), and counsel for the defendant in error concede it. It is unncessary, therefore, to do more than point out that Congress might have done this either (a) under its war powers (Art. 1, Sec. 8, pars. 11, 12, 13, 14), *Ex parte Milligan,* 4 Wall. 2, 139; *Miller* v. *United States,* 11 Wall. 268, 304; *Stewart* v. *Kahn,* 11 Wall. 493, 506; *Legal Tender Cases,* 12 Wall. 457, 539; *Tarble's case,* 13 Wall. 397, 408; 2 *Story on the Constitution,* sec. 1183; or, (b), under its power to regulate commerce among the several states (Art. 1, Sec. 8, par. 3), *Minnesota Rate Cases,* 230 U. S. 352, 399, *Shreveport case,* 234 U. S. 342, 351.

2. By the Acts of August 29, 1916, and March 21, 1918, the President was given control over all traffic, state and interstate, and was empowered to initiate rates, fares and charges by filing them with the Interstate Commerce Commission.

So complete was the control given to the President "in time of war" over systems of transportation by the Act of August 29, 1916, that he was authorized to utilize them for the transportation of troops, war material, etc., "*to the exclusion,* as far as may be necessary, of all other traffic thereon." Possessing authority *to exclude* all other traffic, state or interstate, he could, of course, say what should be charged for

moving it. This authority, it will be observed, was continued in effect by section 9 of the Act of March 21, 1918, which provides, in addition, that,

> "The President, in addition to the powers conferred by this Act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

Again, section 10 of the Act of March 21, 1918, gives the President express authority during Federal control to initiate rates and fares by filing them with the Interstate Commerce Commission; and that Commission upon complaint is empowered to enter upon a hearing concerning the justness and reasonableness of "said rates and fares." This authority covers *all* rates and fares. It is not limited to interstate rates or fares, nor can any reason be suggested why it should be so limited. Every consideration which could prompt the President to increase interstate rates must, of course, prompt him to increase those applying wholly within a state; indeed, discrimination must inevitably result if there were an increase of the one class without a corresponding increase of the other. Congress by section 10 did indisputably give him power to increase interstate rates and deprived the Interstate Commerce Commission of the power to suspend them; the State does not and cannot deny this. Yet its argument is that though the law was, as expressly declared in its last section, "emergency legislation" enacted by Congress in time of war, under its war powers, and designed to vest in the Commander in Chief authority commensurate with his duties and responsibilities, it yet left him a helpless petitioner before forty-eight independent state tribunals for the permission neces-

sary to make his action effective and lawful.

The authorities are directly opposed to any such narrowing of the plain meaning of the language used. In the first *Employers' Liability Cases,* 207 U. S. 463, 500, this court considered an act of Congress giving to "any employee" of a carrier engaged in interstate commerce a right to recover damages resulting from the negligence of a fellow servant. Its constitutionality was questioned upon the ground that by its terms it was broad enough to apply to an employe engaged wholly in intrastate commerce; and it was argued that *to save the act* the words "any employe" must be held to mean only employes engaged in interstate commerce. This court said:

> "So far as the face of the statute is concerned, the argument is this, that because the statute says carriers engaged in commerce between States, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business and none other of such carriers, and that the words 'any employe' as found in the statute should be held to mean any employe when such employe is engaged only in interstate commerce. But this would require us to write into the statute words of limitation and restriction not found in it."

In the *Trade-Mark cases,* 100 U. S. 82, 98, this court, in dealing with the general language of the act of Congress there under consideration, said:

> "It has been suggested that if Congress has power to regulate trade-marks used in commerce with foreign nations and among the several States, these statutes shall be held valid in that class of cases, if no further. To this there are two objec-

> tions: First, the indictments in these cases do not show that the trade-marks which are wrongfully used were trade-marks used in that kind of commerce. Secondly, while it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

It is to be observed that in both these cases the court refused to narrow the meaning of language even to save the constitutionality of an act of Congress. *A fortiori,* it will give general language its natural meaning when the constitutionality of the statute is not at stake, and when the only effect of doing otherwise would be to strike down the action of the Executive, taken in time of war, in the exercise of what is conceded to have been an honest, even if erroneous judgment.

Moreover, the power thus given to the President by section 10 to initiate "rates, fares, charges, classifications, regulations, and practices" must be considered in the light of the purpose for which he was to initiate them, and the manner in which the properties were to be operated, as shown by that section. It was recognized that to pay increased expenses, taxes, and compensation to the companies he would probably be obliged to increase rates; and it was provided that if complaint should be made to the Interstate Commerce Commission regarding them consideration must be given to his certificate that he had in fact been obliged

to do so. The properties, it was said, were to be operated "as a unit", and "under a *unified* and co-ordinated *national* control." How could they be so operated if subject to the regulation of the various States, as to a considerable part of their traffic? And how was the President to proceed to get the needed additional revenue? Was he to make a segregation between interstate expenses and returns, and intrastate expenses and returns, along the lines pursued in the various rate cases with which the Court is familiar? Such segregations, while theoretically possible, are essentially impracticable, and as this Court must have come to realize are of little value when made. But if we accept the theory that it was the duty of the President to deal with each state as to the rates within the state and to deal with the Interstate Commerce Commission only as to the interstate rates, such a view must proceed upon the idea that there is a practical basis for segregation. If this is true it must follow that the President ought to have made a separate study of all the intrastate operations so as to decide how the increased burden should be divided. If the President had undertaken to do this it would probably have been 1924 or 1925 before he could have reached a conclusion.

Surely it is not credible that Congress in providing a method to meet a *war emergency,* intended any such result.

It is said, however, that the very language of section 10 shows that it was never intended to apply to intrastate rates, because it authorizes the Commission on complaint to make only "such findings and orders as are authorized by the Federal Act to Regulate Commerce", and to enforce them as provided in that Act.

The argument is that the orders and findings authorized by the Act to Regulate Commerce are only such as relate to interstate traffic; and as these are all the Commission is authorized to make, no provision is made for dealing with cases involving intrastate rates, and it is therefore clear Congress was not legislating with reference to them.

This argument utterly misconceives the scope and purpose of the language in question. That language authorizes the Commission to make "*such*" findings and orders as the Act to Regulate Commerce authorizes. Now, what orders and findings does that Act authorize? It authorizes findings as to whether rates under attack are unjust or unreasonable; as to whether they are unduly discriminatory or unduly preferential; as to what will be proper rates to substitute therefor; as to whether practices of the carriers are proper; as to whether a claimant has suffered damage and is entitled to reparation; and it authorizes orders giving effect to its findings, and in certain cases,—as where the order requires the payment of money,—proceedings in court to enforce them. Congress might have enumerated specifically each of the findings and orders described in the Act to Regulate Commerce which it was empowering the Commission to make; but it wished to avoid circumlocution. It was enacting emergency legislation dealing with temporary conditions. The machinery already provided by the Interstate Commerce Act was adequate to any case involving a complaint as to rates, and therefore it authorized the Commission, in dealing with any case involving rates, whether state or interstate, to make findings and orders *such as* (i. e., *of the character of*) those authorized by that Act.

Far from telling against the construction for which we contend, the language here in question tells dis-

tinctly in its favor. Had section 10 been concerned alone with interstate rates and fares, there would have been no point in giving to the Commission authority, when such rates were attacked, to make such findings and orders as the Interstate Commerce Act authorized. *The Commission had that authority already.* The very purpose of the language was to give it like authority in cases of a character which it had not previously been authorized to consider.

3. Section 15 of the Act of March 21, 1918, does not limit or qualify the power given by Section 10 to initiate rates.

The case of the State rests entirely upon an affirmation of what the foregoing proposition denies. The State contends that in preserving unimpaired its "lawful police regulations" Congress restricted to interstate commerce the authority given by section 10 to initiate rates; or, stated differently, that this language in section 15 proves that section 10 was not intended to have the broad effect now claimed for it. The argument is that laws relating to the regulation of rates and fares are "police regulations" and that these are not preserved unimpaired if the President is given authority to disregard them.

Taking the term "police power" in its broad sense, it is undoubtedly true that laws regulating rates and fares may properly be referred to that power; but in its broad sense almost every legislative enactment might be referred to it. As said in Mr. Justice Wayne's opinion in the *Passenger Cases,* 7 Howard 282, 423:

> "Police powers and sovereign powers are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of a sovereign."

It is not in this broad sense that the term is commonly used. In its ordinary sense it is taken "to extend to the protection of the lives, health and property of the citizen and to the preservation of good order and the public morals." *Beer Co.* v. *Massachusetts,* 97 U. S. 25, 33. It is a power which cannot be bargained away, *Beer Co.* v. *Massachusetts, supra,* and by that very fact the rate-regulating power falls outside it, for that power may be and frequently is bargained away. *Detroit* v. *Dertoit Citizens' Street Ry.,* 184 U. S. 368; *Cleveland* v. *Cleveland City Ry. Co.,* 194 U. S. 517; *Minneapolis* v. *Street Ry. Co.,* 215 U. S. 417.

In *Manigault* v. *Springs,* 199 U. S. 473, 481, this court said:

> "It only remains to consider, in connection with this branch of the case whether the act of the General Assembly of 1903 was a proper exercise of the *police power* of the States. Of this we have no doubt. Although it was not an exercise of *that power in its ordinarily accepted sense of protecting the health, lives, and morals of the community,* it is defensible in its broader meaning of providing for the general welfare of the people by the reclamation."

In his work on *Police Power,* Freund says, at section 10 (Edition of 1904):

> "The exercise of the police power for the protection, safety, order and morals, constitutes the police power in the *primary* or *narrower sense* of the term. It is a power so vital to the community

> that it is often conceded to local authorities of limited power. It is a police power in this narrower sense of the term which the Supreme Court of the United States concedes on principle to the States, even where its exercise affects interstate and foreign commerce."

Moreover it is to be observed that it is not the "police power" of the States that section 15 preserves unimpaired, but only their "lawful police regulations."

The real extent of the limitation imposed by section 15 will appear more clearly if that limitation is placed in juxtaposition with the other material provisions of the Acts of August 29, 1916, and of March 21, 1918. Those provisions, taken together, would read as follows:

> "The President in time of war is empowered to take possession and assume control of any systems of transportation and utilize the same for the transfer or transportation of troops, war material and equipment or for such other purposes connected with the emergency as may be needful or desirable, to the exclusion as far as may be necessary of all other traffic thereon. He may initiate rates, fares and charges by filing the same with the Interstate Commerce Commission, and they shall not be suspended by the Commission pending final determination; but the lawful police regulations of the several states shall not be impaired or affected."

This, we submit, expresses accurately the material provisions of the Act of August 29, 1916, and of sections 9, 10 and 15 of the Act of March 21, 1918. These provisions mean what they would have meant had they been stated in the foregoing order; but had they been

so stated surely no one would deny that they authorized the President to initiate rates and fares applicable to intrastate traffic by filing them with the Interstate Commerce Commission.

But it is said that the exception to section 15 proves that the term "lawful police regulations" was used in the broad sense; because that section, after preserving unimpaired to the states their "existing laws or powers in relation to taxation" and their "lawful police regulations", specifically excepts any situation where "such laws, powers or regulations may affect the transportation of troops, war materials, government supplies, *or the issue of stocks and bonds.*" The argument is that a law regulating the issue of stocks and bonds would not commonly be called a "police regulation" in the primary sense of that term; and the very fact that Congress made an exception of such a law shows that it used the term, not in the primary or narrow, but in the broad sense, for it would not have excepted such laws from the term if the term did not include them.

Now it is not accurate to say that such laws are not police laws or regulations in the primary sense of the term. The so-called "Blue-Sky" Laws are police laws in the strictest sense, as directed against fraud. But it is unncessary to rely on this. The argument assumes that the exception relating to the issue of stocks and bonds was an exception out of the "lawful police regulations" which had been preserved unimpaired. It was nothing of the kind. Explicit and unqualified power over the issuance of such securities had been given to the President by section 7 of the Act; and probably no one would contend in the face of that section that the preservation unimpaired of

"lawful police regulations" would affect the powers there given; but many States, as the court knows judicially, have laws imposing *taxes* upon the issuance of stocks and bonds by carriers; and as the first part of section 15 preserves unimpaired "existing laws or powers of the States in relation to *taxation,*" it was of the highest importance to make it clear that neither by any existing tax law nor by the exercise of any existing tax power could a tax be placed upon the issue of such stocks and bonds as the President might think necessary to authorize during the emergency. Obviously, it was upon the clause preserving State tax laws that this exception was intended to operate.

It is said, however, that the history of section 15 in its passage through both Houses proves that Congress intended by that section to preserve unimpaired the State's power of rate regulation. This argument rests upon the fact that the bills dealing with this subject which passed the Senate and House, while generally alike, had numerous points of difference in detail, and were therefore referred to a Conference Committee. The House Bill, as thus referred, provided, that "nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation, or the lawful police regulations of the several states, except wherein those regulations may affect the transportation of troops, war materials or government supplies, *the regulation of rates, the expenditures of revenues, the addition to or improvement of properties,* or the issue of stocks and bonds." The Conference Committee struck out the italicized words, and the remainder was reported with slight changes as the present section 15, and adopted with the rest of the bill. No explanation what-

soever was made by the Conferees of their purpose in eliminating these phrases. The hearings before Committees, and the observations of members in the course of the progress of the bill show that it was the purpose and aim of those who advocated the adoption of the provisions of section 10 to vest in the President primary control of *all* rates, state and interstate.*

The argument of the State, then, is drawn not from anything that is said in the Conference report, but from the action of the Conferees. That argument rests wholly upon the dropping out of the words "the regulation of rates". With those words in the section, it is said, it would have been plain that the President was vested with control over intrastate rates; and although the Conference Committee did not say so, their only purpose in eliminating them *must have been* to deprive him of such control.

But this argument begs the question. If the term "police regulations" was used in its primary sense good draughtmanship would have suggested their elimination, as being altogether redundant. And besides if we are to speculate as to motives or purposes (and we are in fact entirely in the realm of speculation, nothing having been said on the subject in the report) we must bear in mind that it is not so much a question what the Conferees intended by their action as what the Senators and Representatives believed to have been accomplished by it; and considering the whole purpose of the legislation, is it supposable that any Member of Congress believed that so important and necessary a power had been withdrawn from the President by the elimination, without a word of explanation, of a single phrase?

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*See for instance, "Hearings before House Committee, pp. 74, 578, 582, 619, 756; Congressional Record, Vol. 56, pp. 2636, 2637, 2684, 1934, 2569."

It is perfectly apparent, moreover, that this argument proves too much. The words "the regulation of rates" were not the only words eliminated by the Conference from the new section 15. There were eliminated as well the words "the expenditure of revenues, the addition to or improvement of properties." Now if by elimination of the words "the regulation of rates" the President became subjected to State authority in the matter of regulating rates, then by the elimination of the other words he became subjected to State authority in the matter of expenditures of revenues and in the matter of additions to and improvements of properties. Does not this reduce the contention to an absurdity? Is it thinkable that, with the nation at war, the President was obliged to consult State laws to ascertain whether he was within his rights in expending revenues derived from railroad operations? Or that he was to get the authority of the State Commissions before he could make additions and improvements necessitated by the war emergency, when Section 6 of the act not only gave him the fullest authority to make them, but appropriated half a billion of dollars with which to pay for them?

Again, if all State police regulations in the broad sense were to be observed, it is not alone in the matter of rate regulations that the President has been at fault. How about State laws forbidding consolidation of parallel and competing lines? These certainly are police regulations in the broad sense. He has disregarded them. Was he bound to observe them? He thought he was not, for he was told by the Act that "a *unified* and co-ordinated *national* control" was provided for. Unification and co-ordination and nationalization of the railroads were the primary objects sought to be obtained; and can anything be more absurd than to suppose that Congress meant to undo its

own work, and by its use of the term "police regulations" in section 15 to defeat the very purpose for which the law was enacted?

4. Section 15, as construed by the court below, is repugnant not only to the specific provisions of Section 10, but as well to the whole spirit of the Federal Control Act. It must be construed so as to harmonize with those provisions and with that spirit.

(a) That it is opposed to the specific provisions of Section 10 is apparent at once. That section tells the President that by filing them with the Interstate Commerce Commission he may initiate rates which the Commission shall be powerless to suspend pending final determination; and this, as we have seen, within the principles of statutory construction which this court has laid down, means *all* rates, state as well as interstate. Section 15, on the other hand, as construed by the court below, directly negatives this and tells him that as to traffic moving locally within each of the forty-eight States, he may not initiate rates in this way, but must observe existing state regulations. But the language of Section 10 is specific; it deals directly with the subject in hand, namely, rates, and tells the President how he may initiate them. The language of Section 15, out of which the court below spells a prohibition against this, is general. It is not an express statement that he may not initiate those intrastate rates, which Section 10 says he may. It is a mere general statement that those exceedingly vague things called "lawful police regulations" are to remain unimpaired. We have, then, a case for the application

of the recognized rule of statutory construction, that specific provisions of a statute will control general provisions either of a later statute or of the same statute, with which they appear to be in conflict. In *Rodgers* v. *United States*, 185 U. S. 83, 87, this court reviewed the authorities on this question, saying:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general —the terms of the general broad enough to include the matter provided for in the special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

The authorities which the court goes on to cite show that the same doctrine is applicable to inconsistent provisions of the same statute.

(b) The Federal Control Act, as expressly declared in its 16th section, was "*emergency* legislation enacted to meet conditions growing out of the war." Together with the Act of August 29, 1916 (which by its 9th section it continued in effect), it empowered the President "to utilize" the transportation systems of the country "*to the exclusion,*" if necessary, of all other traffic thereon. He was so to utilize them to meet the conditions of a war concerning which, in the public statement accompanying the proclamation by which they were taken under control, he used this language:

> "This is a war of resources, no less than of men, perhaps even more than of men, and it is necessary, for the complete mobilization of our resources that the transportation systems of the country should be organized and employed *under a single authority* and a simplified method of coordination which have not proved possible under private management and control."

With the same thought in mind, and realizing the nature of the emergency in which he must act, he provided in the proclamation itself that,

> "Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. *But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such.*"

To the same end (and as it would seem with this very language in mind), Congress by the Federal Control Act gave to the President the right to initiate rates, took from the Interstate Commerce Commission any power which it had to suspend them, brought all railroads, even the short lines (many of which were not engaged in interstate commerce at all), under the President's control, provided that they should be operated "as a unit" and "under a *unified* and coordinated *national* control," and that when the Interstate Commerce Commission came to consider the reasonableness of any rates which the President might make it should bear in mind that they were so oper-

ated, and should consider his certificate that it was necessary to increase revenues from their operation. This court knows from the cases which it has considered and decided in recent years, how great are the difficulties of distinguishing—how practically impossible it is to distinguish—interstate from intrastate commerce. It knows of the conflicts that arise whenever an attempt is made to increase rates applicable to the one class of commerce without at the same time increasing those applicable to the other. It knows that as a practical matter any attempt of the President to make railroad traffic yield adequate revenues would be not only manifestly unjust, but utterly abortive, if made with reference to interstate traffic alone. It knows that if the right to increase intrastate rates and fares was dependent upon the consent of the state regulating bodies, not only must the process be tedious and ill-adapted to a war emergency, but, as to many of the rates and fares, the consent could not be obtained at all, because in many of the states the rates and fares are fixed by statutes which the regulating Commissions are powerless to change. It is not credible that Congress in dealing with such a situation, and with so full a realization of its necessities, intended while vesting in the President so full a measure of power on one side, to leave him helpless on the other.

We say, then, that to construe Section 15 as forbidding interference with state rates except through the observance of the rigid formalities adapted to times of peace, is to construe the Act as rendering the President impotent in the very field in which by its whole spirit and purpose it professed to enlarge his powers. It is to construe it as giving power in one section and withdrawing it in another; as providing for a "uni-

fied and coordinated national control" and then subjecting that control to the diversified judgments and tedious procedure of the regulating tribunals and legislatures of forty-eight states; as depriving the Interstate Commerce Commission of its powers, and leaving the states in full possession of theirs; as professing to deal with a war emergency, and yet subjecting the President to the restraints proper to times of peace. Such a construction of the Act gives rise to the plainest repugnancy; and even if the language of Section 15, instead of being general, had been specific, it would be the duty of the court to harmonize it with the other provisions of the Act and with the spirit which pervades that Act as a whole. Three recent and well known decisions of this court afford striking illustrations of the application of this principle. We refer to *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio Railroad Co.* v. *Pitcairn Coal Co.*, 215 U. S. 481, and *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

In the *Abilene case* the court considered the meaning of the 9th section of the Act to Regulate Commerce. That section in the broadest language gave to "any person or persons claiming to be damaged" by a common carrier the right to proceed either in court or before the Commission to recover such damages; and the Abilene Company, relying on this section and without appealing to the Commission to say whether the rates in question were unreasonable, commenced an action in court to recover damages claimed to have been suffered by reason of the exaction of unreasonable rates. The court held that such an action could not be maintained; and answering the contention that section 9 expressly gave the right to maintain it, it said: (p. 441)

> "True it is that the general terms of the section when taken alone might sanction such a conclusion, but when the provision of that section is read in connection with the context of the act and in the light of the considerations which we have enumerated we think the broad construction contended for is not admissible."

In the *Pitcairn case* the court considered the meaning of Section 23 of the Act to Regulate Commerce. That section authorizes the commencement of mandamus proceedings in the most explicit language. The Pitcairn Coal Company, relying on this language and without a previous submission of the question to the Interstate Commerce Commission, began a proceeding in mandamus against the Baltimore & Ohio Railroad Company to compel delivery to it of a number of cars. The court held that the action could not be maintained. It said:

> "It being demonstrable, as we have seen, that to give to section 23 the broad meaning which the court below affixed to it would be to destroy or render inefficacious the remedial purposes of the amendments enacted in 1906, it must follow that such construction cannot be adopted, since to do so would compel us to hold that the wide and far-reaching remedies created by the amendments of 1906 were, in effect, destroyed by the narrower remedial processes which had been previously enacted in 1889."

In the *Crominger case* the court considered the meaning of the proviso to the Carmack Amendment, to the effect that "nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under ex-

isting law." Relying upon this language, Croninger sought to enforce a right which "he had under the existing law" of the State of Kentucky. The court held that he could not do so; that his right under the Act to Regulate Commerce was exclusive; and though the proviso had in express terms preserved to shippers their rights of action under existing law, this proviso must be construed in the light of the whole purpose of the Act. The court said:

> "To construe this proviso as preserving to the holder of any such bill of lading any right or remedy which he may have had under existing *Federal* law at the time of his action, gives to it a more rational interpretation than one which would preserve rights and remedies under existing *state* laws, for the latter view would cause the proviso to destroy the act itself. One illustration would be a right to a remedy against a succeeding carrier, in preference to proceeding against the primary carrier, for a loss or damage incurred upon the line of the former. The liability of such succeeding carrier in the route would be that imposed by this statute, and for which the first carrier might have been made liable."

5. Any state regulation limiting the President's right to initiate rates and fares would affect the transportation of troops, war materials and government supplies.

Even if a state law regulating rates is a "lawful police regulation" within the meaning of section 15, the President, by the very terms of that section, was relieved from the necessity of observing it if its observ-

ance would affect the transportation of troops, war materials or government supplies. Is it certain that such a law would *not* have that effect; or, to put it on the lowest ground, is it *so* certain as to justify a court at this day, when the crisis is past, in undoing what the President then did? He was in charge of the transportation systems of the country. He had to operate them; and the consideration of the first importance was, of course, to utilize them in the movement of troops and war material. He could not in such an exigency allow their operation to cease through the disaffection or strikes of employes. This court knows judicially that on the very day when the Director General issued Order No. 28, increasing railroad rates, he issued as well Order No. 27, increasing by several hundred millions of dollars annually the wages of railroad employes. The money to meet this added charge must come from some source; it was proper that it should come from the shippers and passengers for whom, for the most part, it was incurred; and it was proper, indeed it was necessary, that in distributing the burden interstate shippers and passengers should not be discriminated against. Confronted with this situation the President might well have said: "These state laws which require me, at such a time, to observe all the formalities of a procedure adapted to times of peace, in order to get that financial assistance which to be effective must be obtained promptly, are a real hindrance to the effective prosecution of the war, and their observance would affect the movement of troops and war materials." And if in the exercise of his executive discretion he took this view, is it the function of a court now to say that he was wrong?

6. Any doubt as to the meaning of the law will be resolved in favor of the Executive's practical construction of it.

It is to be remembered that the action complained of was not that of a railroad corporation. These rates and fares were not increased by the Northern Pacific Railway Company. They were increased by the President of the United States, in time of war, at a critical period in the history of the nation and of the world, and in the exercise of what *he believed* to be authority duly vested in him by Congress. No one questions or would dream of questioning his good faith; on one would think of suggesting that in what he did he or those through whom he acted had any ulterior or unworthy ends to serve. He acted with absolute impartiality. He imposed upon the commerce of North Dakota no burden not placed equally upon the commerce of every other part of the nation. His authority to do this was not then challenged. North Dakota, like every other state in the nation, acquiesced in and recognized it; and from the intrastate rates thus established and assented to many millions of dollars, as the answer shows (R. 15) have been collected and disbursed by the United States Government. We have, then, the disinterested, practical construction placed upon a law by those whose duty it was to adiminister it, and acquiesced in by the very parties who now challenge it. Unless that construction was clearly erroneous the courts will sustain it. Authorities in support of this proposition might be multiplied indefinitely. We cite only two or three of them.

In *Heath* v. *Wallace* 138 U. S. 573, 582, the court said:

> "Moreover, if the question be considered in a somewhat different light, viz., as the contemporaneous construction of a statute by those officers of the government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons."

In *Pennoyer* v. *McConnaughy,* 140 U. S. 1, 23, the court said:

> "The principle that the contemporaneous construction of a statute by the executive officers of the government, whose duty it is to execute it, is entitled to great respect, and should ordinarily control the construction of the statute by the courts, is so firmly imbedded in our jurisprudence, that no authorities need be cited to support it. On the faith of a construction thus adopted, rights of property grow up which ought not to be ruthlessly swept aside, unless some great public measure, benefit or right is involved, or unless the construction itself is manifestly incorrect."

See also, *Hahn* v. *United States,* 107 U. S. 402; *United States* v. *Moore,* 95 U. S. 760.

Respectfully submitted,

ALEX. C. KING,
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APPENDIX.

I.

Extract from Act of August 29, 1916 (39 Stat. 645).

The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable. * * *

II.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives bearing date April 6, 1917, resolved:

That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.

And by resolution bearing date of December 7, 1917, resolved:

That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; and that the President be, and he is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

And whereas it is provided by section 1 of the act approved August 29, 1916, entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," as follows:

The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary of all other traffic thereon for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling,

do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies, and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportations; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employes of said systems of transportation. Until and except so far as said director shall from time to time

by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such.

Nothing herein shall be construed as now affecting the possession, operation, and control of street electric passenger railways, including railways commonly called interurbans, whether such railways be or be not owned or controlled by such railroad companies or systems. By subsequent order and proclamation, if and when it shall be found necessary or desirable, possession, control, or operation may be taken of all or any part of such street railway systems, including subways and tunnels; and by subsequent order and proclamation possession, control, and operation in whole or in part may also be relinquished to the owners thereof of any part of the railroad systems or rail and water systems, possession and control of which are hereby assumed.

The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the

possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.

But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

Regular dividends hitherto declared and maturing interest upon bonds, debentures, and other obligations may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said director shall from time to time otherwise by general or special orders determine; and, subject to the approval of the director, the various carriers may agree upon and arrange for the renewal and extension of maturing obligations.

Except with the prior written assent of said director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine.

From and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. But for the purpose of accounting said possession and control shall date from 12 o'clock midnight on December 31, 1917.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President, through Newton D. Baker, Secretary of War, in the District of Columbia, this 26th day of December, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-second.

WOODROW WILSON.

By the President:
ROBERT LANSING,
Secretary of State.
NEWTON D. BAKER,
Secretary of War.

III.

An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, having in time of war taken over the possession, use, control, and operation

(called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the accounts called in monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth nineteen hundred and seventeen, the total railway

operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own

funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accountings and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the deter-

mination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of non-operation, receivership, or where recent expenditures for additions or improvements or equipment were not fully refleted in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act; *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this act

and any regulations or order made by or through the President under authority of this act or of that portion of the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

SEC. 2. That if no such agreement is made, or pending the execution of an agreement, the President may nevertheless pay to any carrier while under Federal control an annual amount, payable in reasonable installments, not exceeding ninety per centum of the estimated annual amount of just compensation, remitting such carrier, in case where no agreement is made, to its legal rights for any balance claimed to the remedies provided in section three hereof. Any amount thereafter found due such carrier above the amount paid shall bear interest at the rate of six per centum per annum. The acceptance of any benefits under this section shall constitute an acceptance by the carrier of all the provisions of this Act and shall obligate the carrier to pay to the United States, with interest at the rate of six per centum per annum from a date or dates fixed in proceedings under section three, the amount by which the sums received under this section exceed the sum found due in such proceedings.

SEC. 3. That all claims for just compensation not adjusted (as provided in section one) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being

eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington and elsewhere, as their duties and the convenience of the parties may require. In case of disobedience to a subpœna the board may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any person, corporation, partnership, or association, issue an order requiring appearance before the board, or the production of documentary evidence if so ordered, or the giving of evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Such cases may be heard separately or together or by classes, by such boards as the Interstate Commerce Commission in the first instance, or any board of referees to which any cases shall be referred may determine. Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board, and may include therein provisions similar

to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way.

SEC. 4. That the just compensation that may be determined as hereinbefore provided by agreement or that may be adjudicated by the Court of Claims, shall be increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier made by such carrier with the approval of or by order of the President while such property is under Federal control.

SEC. 5. That no carrier while under Federal control shall, without the prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ended June thirtieth, nineteen hundred and seventeen: *Provided, however,* That such carriers as have paid no regular dividends or no dividends during said period may, with the prior approval of the President, pay dividends at such rate as the President may determine.

SEC. 6. That the sum of $500,000,000 is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the expenses of the

Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, such terminals, motive power, cars, and equipment to be used and accounted for as the President may direct and to be disposed of as Congress may hereafter by law provide.

The President may also make or order any carrier to make any additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other equipment necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier. He may from said revolving fund advance to such carrier all or any part of the expense of such additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other necessary equipment so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier and to bear interest at such rate and be payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced.

Any loss claimed by any carrier by reason of any such additions, betterments, or road extensions so ordered and constructed may be determined by agreement between the President and such carrier; failing such agreement the amount of such loss shall be ascertained as provided in section three hereof.

From said revolving fund the President may expend such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways, and

may in the operation and use of such facilities create or employ such agencies and enter into such contracts and agreements as he shall deem in the public interest.

SEC. 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures, or for reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock, and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. The President may, out of the revolving fund created by this act, purchase for the United States all or any part of such securities at prices not exceeding par, and may sell such securities whenever in his judgment it is desirable at prices not less than the cost thereof. Any securities so purchased shall be held by the Secretary of the Treasury, who shall, under the direction of the President, represent the United States in all matters in connection therewith in the same manner as a private holder thereof. The President shall each year as soon as practicable after January first, cause a detailed report to be submitted to the Congress of all receipts and expenditures made under this section and section six during the preceding calendar year.

SEC. 8. That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and co-operation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as

Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, such terminals, motive power, cars, and equipment to be used and accounted for as the President may direct and to be disposed of as Congress may hereafter by law provide.

The President may also make or order any carrier to make any additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other equipment necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier. He may from said revolving fund advance to such carrier all or any part of the expense of such additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other necessary equipment so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier and to bear interest at such rate and be payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced.

Any loss claimed by any carrier by reason of any such additions, betterments, or road extensions so ordered and constructed may be determined by agreement between the President and such carrier; failing such agreement the amount of such loss shall be ascertained as provided in section three hereof.

From said revolving fund the President may expend such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways, and

may in the operation and use of such facilities create or employ such agencies and enter into such contracts and agreements as he shall deem in the public interest.

SEC. 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures, or for reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock, and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. The President may, out of the revolving fund created by this act, purchase for the United States all or any part of such securities at prices not exceeding par, and may sell such securities whenever in his judgment it is desirable at prices not less than the cost thereof. Any securities so purchased shall be held by the Secretary of the Treasury, who shall, under the direction of the President, represent the United States in all matters in connection therewith in the same manner as a private holder thereof. The President shall each year as soon as practicable after January first, cause a detailed report to be submitted to the Congress of all receipts and expenditures made under this section and section six during the preceding calendar year.

SEC. 8. That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and co-operation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as

he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law.

SEC. 9. That the provisions of the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this act shall also apply to any carriers to which Federal control may be hereafter extended.

SEC. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the

Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be transferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition.

After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

SEC. 11. That every person or corporation, whether carrier or shipper, or any receiver, trustee, lessee, agent, or person acting for or employed by a carrier or shipper, or other preson, who shall knowingly violate or fail to observe any of the provisions of this act, or shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, or shall knowingly violate any of the provisions of any order or regulation made in pursuance of this act, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than $5,000, or, if a person, by imprisonment for not more than two years, or both. Each independent transaction

constituting a violation of, or a failure to observe, any of the provisions of this act, or any order entered in pursuance hereof, shall constitute a separate offense. For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various States where applicable, shall apply to all officers, agents, and employees engaged in said railroad and transportation service, while the same is under Federal control, to the same extent as to persons employed in the regular service of the United States. Prosecutions for violations of this act or of any order entered hereunder shall be in the district courts of the United States, under the direction of the Attorney General, in accordance with the procedure for the collection and imposing of fines and penalties now existing in said courts.

SEC. 12. That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December twenty-

seventh, nineteen hundred and seventeen, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with Federal control as the President may direct, except that taxes under Titles One and Two of the act entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October third, nineteen hundred and seventeen, or any act in addition thereto or in amendment thereof, shall be paid by the carrier out of its own funds. If Federal control begins or ends during the tax year for which any taxes so chargeable to railway tax accruals are assessed, the taxes for such year shall be apportioned to the date of the beginning or ending of such Federal control, and disbursements shall be made only for that portion of such taxes as is due for the part of such tax year which falls within the period of Federal control.

At such periods as the President may direct, the books shall be closed and the balance of revenues over disbursements shall be covered into the Treasury of the United States to the credit of the revolving fund created by this act. If such revenues are insufficient to meet such disbursements, the deficit shall be paid out of such revolving fund in such manner as the President may direct.

SEC. 13. That all pending cases in the courts of the United States affecting railroads or other transportation systems brought under the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as amended and supplemented, including the commodities clause, so-called, or under the act to protect trade and commerce against unlawful restraint and monopolies, approved July second,

eighteen hundred and ninety, and amendments thereto, shall proceed to final determination as soon as may be, as if the United States had not assumed control of transportation systems; but in any such case the court having jurisdiction may, upon the application of the United States, stay execution of final judgment or decree until such time as it shall deem proper.

SEC. 14. That the Federal control of railroads and and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided, however,* That the President may prior to July first, nineteen hundred and eighteen, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.

SEC. 15. That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect

the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

SEC. 16. That this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the methods or basis of the capitalization thereof.

Approved March 21, 1918.

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NO. 976

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1918.

NORTHERN PACIFIC RAILWAY COMPANY, and WALKER D. HINES, as Director General of Railroads,
Plaintiffs in Error.

vs.

STATE OF NORTH DAKOTA, ex rel., WILLIAM LANGER, Attorney General,
Defendant in Error.

Writ of Error to the Supreme Court of North Dakota.

MOTION

of Charles E. Elmquist, a member of the bar of this court, for leave to file a brief amici curiae on behalf of the National Association of Railway and Utilities Commissioners, and his associate attorneys general, commerce counsel and state regulating commissions.

HAWKINS & LOOMIS CO., LAW PRINTERS, 162 W. MONROE ST., CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1918.

NORTHERN PACIFIC RAILWAY COMPANY, and WALKER D. HINES, as Director General of Railroads, *Plaintiffs in Error.* *vs.* STATE OF NORTH DAKOTA, ex rel., WILLIAM LANGER, Attorney General, *Defendant in Error,*	Writ of Error to the Supreme Court of North Dakota.

MOTION.

Now comes Charles E. Elmquist, a member of the bar of this court, general solicitor for the National Association of Railway and Utilities Commissioners, for himself and the attorneys general, commerce counsel and the several state public service commissioners who are parties joining in the brief, and asks leave of this court, the counsel for plaintiff in error and defendant in error consenting, to file a brief *amici curiae* on behalf of the National Association of Railway and Utilities Commissioners, the attorneys general, commerce counsel and the several state public service commissions, who are interested, as public officials, in the issues which are involved in this suit, since they affect the regulating

laws and practices of most of the states in the Union and the authority therefor.

Printed briefs have been duly filed in this court and served upon the counsel for the plaintiff in error and the defendant in error.

Wherefore, said Charles E. Elmquist, prays that he may have leave to file a brief on behalf of the association and officers mentioned herein, as *amici curiae*, in support of the position of the State of North Dakota, *ex rel.*, William Langer, attorney general, defendant in error.

CHARLES E. ELMQUIST.

Dated at Washington, D. C., May 5, 1919.

SERVICE OF MOTION AND NOTICE.

A copy of said motion and notice have been served on counsel for plaintiff in error and defendants in error.

CHARLES E. ELMQUIST.

Washington, D. C., May 5, 1919.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

-10-

NO. 976

IN THE

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BRIEF AMICI CURIAE OF THE SEVERAL STATES AND THE NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS.

HAWKINS & LOOMIS CO., LAW PRINTERS, 162 W. MONROE ST., CHICAGO.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1918.

NORTHERN PACIFIC RAILWAY COMPANY and WALKER D. HINES, as Director General of Railroad, *Plaintiffs in Error.* vs. STATE OF NORTH DAKOTA, ex rel., WILLIAM LANGER, Attorney General, *Defendant in Error.*	Writ of Error to the Supreme Court of North Dakota.

BRIEF AMICI CURIAE OF THE SEVERAL STATES AND THE NATIONAL ASSOCIATION OF RAILWAY AND UTILITIES COMMISSIONERS.

STATEMENT.

This brief is presented in behalf of thirty-seven states of the Union, represented by their respective public service commissions, and by the National Association of Railway and Utilities Commissioners. Every state in the Union, except Delaware, has created public service commissions which are charged with the duty of regulating railroad companies. Their duties vary according to the laws in each state, but, generally speaking, they are vested with jurisdiction over questions of service, practices, account-

ing, and also the reasonableness of rates, fares and charges to be applied to intrastate commerce.

The issue in the pending North Dakota case presents the question of the right of the states of the Union, in the proper exercise of the police power, to regulate intrastate rates, fares and charges of common carriers, during the period of federal control. This vitally concerns the convenience and welfare of the people within these states.

ARGUMENT.

The power to regulate intrastate railroad rates, without complying with the state laws in relation thereto, is claimed to be based, not upon the war power of the President, but upon the war power of Congress as exercised in the Act of August 29, 1916, and the Act of March 21, 1918.

It is claimed by plaintiffs in error that the former act which authorized the President, in time of war,

> "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable"

contained a sufficiently broad grant of power to authorize the President to take the action in question. We will first consider that question.

The Act of August 29, 1916, Conferred No Power Over Intrastate Rates.

What was the occasion of the attachment of the above mentioned provision to the army appropriation bill? The country was not then engaged in war. Our relations with Mexico, however, were strained. We believe it is fair to assume that the act in question was passed with the intention of vesting the President with the authority necessary

to deal successfully with the Mexican situation. If that is so, Congress might well have considered that the President should have the power to take possession of certain lines leading to the Mexican border, and even to exclude some of the ordinary traffic therefrom, in order to secure the prompt and safe transportation of troops and supplies. It is hardly possible that Congress could then have intended to confer on the President authority to regulate all rates, intrastate as well as interstate, in entire disregard of the existing laws governing such regulation.

The necessities of the occasion did not require such action, and if such a proposition had been put before the Congress it would have been met with active opposition and been the occasion of extended debate, as was the case when the right to initiate interstate rates was expressly conferred on the President in the Federal Control Act.

Congress clearly did not intend to confer upon the President by the Act of August 29, 1916, an unlimited right of control over railroads. If such had been its purpose it would not have added the words

> "and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

By the addition of those words Congress plainly indicated the nature of, and the limitations upon, the authority granted. Such authority was, in sub-

stance, to assume control of systems of transportation only so far as might be necessary to secure the prompt transportation and delivery of war material and government supplies, even to the extent of excluding other traffic where that should be necessary.

Furthermore, the wording of the act restricts the purposes of federal control to those which are connected with the emergency. While it is true that the war is not technically ended until the peace treaty is signed and ratified, it is equally true that hostilities have ceased, that all war activities in this nation have been discontinued, and that whatever emergency existed here has disappeared. While the federal possession and control may not be ended, except with the technical ending of the war, the extraordinary powers which the President was authorized by the act to exercise over them, as connected with the emergency, ceased with the emergency.

That the emergency has ceased is shown by the drastic terms of the armistice to which the enemy has submitted, which place it in a position where it will be unable to continue the conflict, as was formally announced by the President in the following language:

> "The war thus comes to an end; for having accepted these terms of armistice it will be impossible for the German command to renew it."

It is evident that the President's statement was correct, for since the cessation of hostilities the German government has surrendered such a large portion of its war equipment as to render itself appar-

ently unable to renew the conflict, and has permitted the occupation by the allied powers of a considerable extent of strategic and valuable territory. The articles agreed upon on the 11th day of November amounted to more than a mere armistice. They constituted, in fact, a surrender upon conditions, the details of which were to be agreed upon thereafter. Now the representatives of the German government are gathering at Versailles to receive the final terms of peace.

Therefore, while the right to the possession and control of transportation systems may still exist, the extent to which that control may be exercised, being automatically governed by the necessity for its exercise, has so far disappeared as to furnish no support for the regulation of intrastate rates.

Whatever may have been the intention of Congress in passing the Act of August 29, 1916, it is apparent that the President did not give it the construction now contended for, because no effort was made to increase railroad rates, until after the passage of the Act of March 21, 1918, except certain demurrage charges.

By the passage of the Act of March 21, 1918, the authority conferred upon the President by the Act of August 29, 1916, was so far modified and limited as to make it clear that no possible rate making power which may have been conferred by the first act remained, except as expressly provided in the later act. This is shown by the provisions of Section 9 of the Federal Control Act, which provides:

"That the provisions of the act entitled 'An

> Act making appropriations for the support of the army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes,' approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this Act,"

and by the provisions of Section 15, which will be discussed later.

Furthermore, if, as claimed by the government, the Act of August 27, 1916, conferred upon the President the rate making power, there was no necessity for making specific reference to the authority of the President to make rates in the Federal Control Act. The fact that, in the last named act, Congress thought it necessary to be specific as to such rate making authority shows that Congress did not consider that such power had been conferred by the Act of 1916. Therefore, the President's authority to regulate intrastate rates, if it exists at all, which we do not concede, must be found in the Act of March 21, 1918.

The Federal Control Act Conferred No Power Over Intrastate Rates.

In this connection we will consider first the provisions of the act relating to the fixing of rates. Section 10 confers upon the President the power to initiate rates by filing them with the Interstate Commerce Commission. The President, as to the carriers under federal control, stands in the position of the executive officers, who have long had the power of initiating interstate rates in the same manner.

The Federal Control Act provides, however, that such rates shall not be suspended by the Commission pending final determination, which is a change from the practice prescribed in the Act to Regulate Commerce.

The Federal Control Act further provides that such rates shall be reasonable and just and that the Commission, shall upon complaint, enter upon a hearing concerning their justness and reasonableness. In determining whether the rates satisfy those standards, the Commission is directed to give due consideration to the fact that the transportation systems are being operated under a unified and coordinated national control and not in competition; and, when the President shall find and certify, that, in order to defray the expenses of federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers operating as a unit it is necessary to increase the railway operating revenues, such fact shall also be taken into consideration by the Commission, together with such recommendation as he may make.

After full hearing the Commission is directed to *"make such findings and orders as are authorized by the Act to Regulate Commerce as amended, and said findings and orders shall be enforced as provided in said act."*

No effort seems to have been made to supersede the tariff provisions of the last mentioned act, except to the extent that the director general may

prescribe the duration of notice and that the Commission cannot suspend the rates pending investigation.

Under the Act to Regulate Commerce the Commission has no jurisdiction over intrastate rates, except to the limited extent held in the *Shreveport case* and similar cases. That act does not authorize the Interstate Commerce Commission to make any findings as to the justness and reasonableness of intrastate rates. Consequently if intrastate rates are initiated by the director general by filing them with the Interstate Commerce Commission, there is no provision for a determination of their justness and reasonableness, although such provision is made for interstate rates.

The contention of defendants, if sustained, would therefore inevitably lead to this conclusion. When both interstate rates and intrastate rates are initiated by the director general, by filing them with the Interstate Commerce Commission, the Commission can review the interstate rates, but not the intrastate rates. Thus the initiation of intrastate rates by the director general would be final.

When a similar power was claimed for the Interstate Commerce Commission it was condemned by this court. The case was that of *Interstate Commerce Commission* v. *Louisville & N. Ry. Co.*, 227 U. S. 88. It was said in the opinion:

> "A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our gov-

> ernment. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The power claimed for the President by plaintiffs in error is open to another constitutional objection which seems to us to be insuperable. It is well established that the regulation of rates is a legislative function. *Milwaukee Elec. R. & L. Co.* v. *Railroad Commission,* 238 U. S. 174, 180. As such it cannot be delegated to the President or any other executive officer. *Field* v. *Clark,* 143 U. S. 649, 692. Therefore, even if the Federal Control Act were intended by Congress to confer authority on the President to regulate intrastate rates, it did not accomplish such purpose in a constitutional manner and accordingly did not accomplish it at all.

Effect of Section 15 of Federal Control Act Considered.

Apparently to remove all possibility of misconstruction, Congress added Section 15 to the Federal Control Act. That section is as follows:

> "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

In considering this section, it is well to call attention, at the outset, to the fact that this proviso is not intended to confer the right to exercise the police power upon the several states, because such power is inherent in them and not in Congress. It has never been surrendered to the Federal Government, and therefore there was no need for Congress to authorize its continued exercise.

Tenth Amendment U. S. Const.

South Carolina v. *United States,* 199 U. S. 437.

Keller v. *United States,* 213 U. S. 138.

The power of each state to regulate the rates to be charged for public utility service performed wholly within the state is beyond question. The power is often called the police power. When it is exercised by the enactment of laws, or orders of administrative bodies, those laws and orders are usually called police regulations.

The term police regulation is no narrower than the term police power. This is shown by the statement, in the case of *Chicago B. & Q. Ry. Co.* v. *Illinois,* 200 U. S. 561, that

> "The police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety."

It is further shown by the following quotation from the opinion in the case of *Union Dry Goods Co.* v. *Georgia Public Service Corporation,* rendered by this court on March 24, 1919, reported on page

116 of the U. S. Supreme Court Advance Opinion No. 6:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of a city is devoted to a use in which the public has an interest which justifies rate regulation by a state *in the exercise of its police power. Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *New York,* 143 U. S. 517; *German Alliance Ins. Co.* v. *Lewis, Superintenednt of Insurance of the State of Kansas,* 233 U. S. 289, 407." (Italics ours.)

See, also, the case of *Hammer* v. *Dagenhart,* 247 U. S. 251.

These authorities are supported by a long line of decisions of this court and of the Supreme Courts of the various states.

It is thus evident that the term "police power" has been used in both the sense of the protection of the public health, safety, and morals, and of the public convenience, and the general welfare, and that the term "police regulations" has no other or different or distinct meaning than "police power." It is simply used to designate all regulations that may be made under the exercise of "police power," whether relating to the public health, safety, morals, convenience, or general welfare, and includes the regulation of public utilities as to their rates and charges, and all like matters which directly concern the public welfare. It seems plain, therefore, that Congress, by including Section 15 in the Federal

Control Act, has expressly recognized the right of the states to insist upon a compliance with the state laws relating to changes in intrastate rates.

No claim can be successfully urged that such compliance will affect the transportation of troops, war materials or government supplies, within the meaning of the exception in Section 15. The claim is made that, if Section 15 is construed to mean that the right to regulate intrastate rates is reserved to the states, it would possibly prevent the President from obtaining sufficient revenue to enable the railroads to be kept in an efficient condition and would thereby affect such transportation. Such would not be the case. It would only mean that the President must obtain authority to secure necessary additional revenue on intrastate traffic through the several state commissions, instead of through the Interstate Commerce Commission. That this would not be impracticable nor unduly burdensome is shown through the one practical application which it has had. We refer to the increase in express rates of July 1, 1918, which had been granted on intrastate traffic by the Interstate Commerce Commission. Application for a like increase was made by telegraph to the various state commissions and the increase was promptly granted, as requested, by all except five states. These five states have since granted such increases, subject to certain modifications necessary to meet local conditions.

The argument that the various states might refuse requested increases and thus create confusion, loses sight of the fact that the standard of rates in

the various states and in interstate commerce is the same; that is to say, just and reasonable rates. Such being the fact, it cannot be assumed that the state commissions will fail to perform their duty and authorize any rates which are not just and reasonable.

Legislative History.

In the construction of the Federal Control Act it is of importance that the history of the legislation in Congress be considered. The course of legislation, the various amendments, conference reports, and even to some extent debates, are to be weighed in determining the construction which should be given to the act. That legislative history is as follows:

When Senate Bill 3752 passed the Senate it contained the following language:

> "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the state in relation to taxation."

H. R. 9685 contained a like clause. In the House the Senate Bill was amended by striking out all after the enacting clause substituting the House Bill. The so-called Caraway amendment provided that after the word "taxation" at the end of Section 11 there should be added the following language:

> "Mr. Caraway: Mr. Chairman, I offer the following amendment:
>
> The clerk read as follows:
>
> 'Page 13, line 10, after the word "taxation" strike out the period and insert a comma and add the following language: "or the lawful commerce and police regulations of the several

All references to The Congressional Record which are made in this brief are to the advance sheets and not the bound volumes.

states, except wherein those regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditures of revenues, the addition to or the improvement of properties or the issue of stocks and bonds.'"

Mr. Caraway: Mr. Chairman, if any other gentleman wants to be heard on this amendment, I am willing to limit my time to less than five minutes and divide with him. The amendment proposes to come in at the end of line 10, which says that nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation.

Mr. Barkley: If the gentleman from Arkansas will accept the amendment to strike out the words 'commerce and,' the committee will not oppose it.

Mr. Caraway: I will be willing to accept it without discussion. Mr. Chairman, I ask unanimous consent to strike out the words 'commerce and.'

The Chairman: The gentleman from Arkansas asks unanimous consent to modify his amendment as the clerk will report.

The clerk read as follows:

'Page 13, line 10, after the word "taxation," strike out the period and insert a comma, and add the following language: "or the lawful police regulations may affect the transportation of troops, war materials, or government supplies, the regulation of rates, the expenditures of revenues, the addition to or the improvement of properties or the issue of stocks and bonds."'

The Chairman: The question is on the amendment. The question was taken and the amendment was agreed to."

Congressional Record, Vol. 56, page 3032.

It will be observed that the "regulation of rates" as provided by the several states was subject to the

act then before Congress and was put upon the same basis as the transportation of troops, war materials, government supplies, or the issue of stocks and bonds. In that form, the bill went to the conference committee. When the bill was reported out of conference, Section 10 appeared substantially in its present form. Cong. Rec., Vol. 56, page 3507 and 3556, Section 15 appeared as follows:

> "That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds: *Provided, however,* That no state or subdivision thereof, or the District of Columbia, shall levy, assess, or collect an amount of taxes from railroad property within the state or subdivision thereof, or the District of Columbia, while under federal control, in excess of the ratio which the total taxes of such state or subdivision thereof, or the District of Columbia, for the year previous to federal control."

In the House of Representatives, the report of the conference committee was accompanied by a statement by the managers on the part of the House, and reference to Section 15 is as follows:

> "The conferees agreed to strike out Section 16 of the House amendment, and substituted therefor a new section, as set out in Section 15 of the conference report, the effect of which change is to provide that no state or subdivision thereof shall increase taxation on railroad property while under federal control in excess of the increase that might be made on other taxable property in the state during such

period. The substitute section also provides that this act shall not be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to the lawful police regulations of the states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

Congressional Record, Vol. 56. page 3556.

Upon further conference, the bill was re-reported to the respective houses. Section 15 then appeared as follows:

"That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

Cong. Rec., Vol. 56, pp. 3715 and 3740.

In the statement of managers on the part of the House, the following was stated with reference to Section 15:

"The conference agreed to strike out Section 16 of the House amendment and substituted therefor a new section as set out in Section 15 of the conference report. The substitute section also provides that this act shall not be construed to amend, repeal, impair, or affect existing laws or powers of the states in relation to the lawful police regulations of the states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds.

The Senate receded from its disagreement to

Section 17 of the House amendment, and agreed to the same."

Cong. Rec., Vol. 56, page 3741.

It is clear from the history of this law that it was never intended that the power of the states over purely intrastate rates should in anywise be molested.

Applicability of Present State Laws.

It is claimed that the reservation to the states of "the power of taxation and the lawful police regulations of the several states" is of no effect because no state has ever enacted any law applicable to railroads which are operated by the Federal Government; that until the power is exercised by the passage of appropriate legislation, no state law is being violated.

Carrying this proposition to its logical conclusion, it would follow that no state in the Union today could tax the property or earnings of railroads under federal control, nor could such state take any action against said railroads for the protection of the health, commerce, or welfare of its citizens. Its power to regulate the speed of trains, to improve station facilities and see that they are kept in a sanitary condition, to require reasonable train service and safe operation, to reduce grade crossings, and all such matters would have to rest in abeyance until suitable legislation could be passed by the state.

To assert the proposition is to deny it. Congress had knowledge of the large body of police legisla-

tion in the various states. In the Federal Control Act, Congress said in effect:

The President having taken over the control and operation of the railroads, may do certain enumerated things specified in the act, but subject to the provision that nothing done by him shall amend, repeal, impair, or affect existing laws or powers of the states in relation to taxation or the lawful police regulations of the states.

Congress was dealing with existing laws and intended by said provisions to preserve unimpaired that large and useful field of legislation, regulation, and practices which have developed during the past thirty-five years.

The director general has placed a practical construction upon the provision in his order No. 58, issued last March, which reads as follows:

> "Transportation systems under federal control continue subject to the lawful police regulations of the several states which were and are applicable to privately operated transportation systems, in such matters as spur tracks, railroad crossings, safety appliances, track connections, train service, the establishment, maintenance, and sanitation of station facilities, the investigation of accidents, and all other matters of local service, safety, and equipment. It will be the policy of the director general to cause the orders of the state commissions in these matters to be carried out."

It seems to us that the argument that the present state laws are inapplicable is answered by the decision of this court that the United States is a corporation. *Chisholm* v. *Georgia,* 2 U. S. 419. All of

the state laws expressly apply to railroads operated by corporations and individuals. Therefore, if it be held that the railroads are operated by the government they are operated by a corporation; and if they are held to be operated by the President, then they are being operated by an individual. In either case the operation comes within the provisions of the state laws.

It is not an answer to this argument to say that the term *corporations* as used in the various state regulatory laws, was not intended to mean corporations such as the United States, because it was not contemplated that the United States would ever operate the railroads. This is so for the reason that the state laws were passed long after the decision referred to, with a presumptive knowledge of a broad scope of the word, and yet its application was not confined, in the various acts, to corporations organized under the laws of the various states or of Congress.

It was held in the case of *Smyth* v. *Ames,* 169 U. S. 466, and *Reagan* v. *Mercantile Trust Company,* 154 U. S. 413, that the state regulatory laws applied to railroads operated by corporations organized under the laws of Congress, although at the time of the passage of the acts the only railroads operating in the United States were those organized under the state laws.

The fact that the government was not operating the railroads at the time of the passage of the state laws would not necessitate the placing of a restricted meaning upon the word corporation. On the con-

trary, it should be given its broad meaning wherever that is necessary to carry out the apparent purposes of the act as is the case here.

This course has been uniformly applied by this court in construing the federal constitution. As an example of such construction, attention is called to the meaning given to the word commerce. It has been held to apply to communication by telephone and telegraph and various other instrumentalities, although they were not in existence at the time the constitution was adopted, and could hardly have been said to have been within the contemplation of the framers of that document.

Where the state laws expressly apply to lessors of railroads the case is even stronger for it is now almost uniformly held that the relationship existing between the government and the railroad corporation is that of lessor and lessee. In such cases then the argument of the plaintiff in error would necessarily fall.

We submit the rule to be that, even though the railroads are operated as a governmental agency, the local laws will control unless Congress, for the purpose of protecting such agency in its governmental purposes, has by appropriate and reasonable legislation excluded such agency from state interference. This rule flows from and is based upon the police powers of the state and its sovereign control over its local and domestic affairs.

This rule is clearly expressed on page 204, Encyclopedia of Supreme Court Reports, Vol. 41:

"A corporation organized under the laws of

the United States is subject to the control of the state as to rates which are wholly within the state. The fact that it receives all its franchises from Congress, that among those franchises is the right to charge and collect tolls, does not exempt it, as to business done wholly within the state, from the control of the state in all matters of taxation, rates, and other police regulations."

Citing:

Reagon v. *Mercantile Trust Co.*, 154 U. S. 413.

To the same point:

Thomson v. *Union Pacific Ry.*, 76 U. S. 579, 590-1.

This is not a Suit Against the United States.

We understand that the question of whether this is a suit against the United States was expressly waived in the State Supreme Court. Inasmuch as we have not received the brief of the plaintiffs in error in this court and are therefore not advised as to whether or not the point will be raised upon this hearing, we desire to submit the following points and authorities upon the proposition:

Section 10 of the Federal Control Act of March 21, 1918, provides that:

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no

> defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferrable prior to the federal control of such carrier * * *."

The above quoted section makes it clear that Congress intended that the state courts were to retain their previous jurisdiction over railroads, even while under federal control. What else could Congress have meant when it said:

> "Actions at law and suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," and that in any such action no defense should be made thereto "upon the ground that the carrier is an instrumentality or agency of the Federal Government"?

This is a suit against a carrier, within the contemplation of the act, and if such suit is permitted at all, the defense that the suit is one against the United States, being necessarily based upon the proposition that the defendant is an agency of the Federal Govermnent, is plainly excluded.

But, irrespective of this last mentioned specific provision, the other clause permitting suit to be brought against the carrier "as now provided by law" is in itself sufficient to prohibit such carrier defending on the ground that the suit is one against the government.

If such defense were good, the authorization for bringing "actions at law or suits in equity" * * *

"against such carriers" would be a nullity. It is well recognized that no part of a statute will be construed so as to be of no force or effect if such construction may be avoided.

However, irrespective of the provisions of Section 10 of the Federal Control Act, above referred to, this action is not an action against the government. The controversy is not of a political nature, nor does it extend to the Constitutional rights or authority of the President. In so far as the President is concerned here, it is by reason of the power delegated to him by Congress and the question as to the extent of the power delegated is not affected by his political office or standing. As said by Chief Justice Marshall, in *Marbury* v. *Madison,* 5 U. S. (1 Cranch.) 137, 166-171:

> "It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety of judicial interference is to be determined."

This action is not brought to interfere with the property of the railway company. It is not brought to interfere with or control the exercise of discretion or authority on the part of any officers or agents of the executive department of the government, as to those duties which the law requires them to perform and as to those matters which come within their jurisdiction. It is to enjoin such officers or agents from acting unlawfully, and as to matters concerning which they are given no jurisdiction or authority under the act.

That such an action is within the jurisdiction of

the courts—either state or federal—is amply sustained by the authorities.

The leading case is that of *United States* v. *Lee*, 106 U. S. 196, which has been followed by a long line of authorities. The case was ejectment. The defendants were military authorities, holding property at Arlington, Va., under the direction of the President, as a military station and a national cemetery, and it was alleged not only that the defendants were acting under the direction of the executive department, but that their possession was the possession of the United States. Accordingly the attorney general appeared, insisting that the court had no jurisdiction and the action should be dismissed. As was said by Mr. Justice Miller, delivering the opinion of the Supreme Court:

> "The defense stands here solely upon the absolute immunity from judicial inquiry of everyone who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power."

The jurisdiction of the court was sustained. It was held that the court was competent to decide the issues before it, and having found that title was in the plaintiff, and having rendered judgment against the defendants, its judgment was affirmed. It was said in the opinion:

> "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and bound to obey it. * * *
>
> Shall it be said, in the face of all this, and of

the acknowledged right of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President, to be unconstitutional, that the courts cannot give remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without any lawful authority and without any compensation, because the President has ordered it and his officers are in possession?

If such is the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights.

It cannot be, then, that when, in a suit between two citizens for the ownership of real estate, one of them has established his right to the possession of the property according to all the forms of judicial procedure, and by the verdict of a jury and the judgment of the court, the wrongful possessor can say successfully to the court, 'stop here; I hold by order of the President, and the progress of justice must be stayed!' "

Another case, having a direct bearing upon the point under discussion, is that of *Osborn* v. *U. S. Bank,* 9 Wheat. 738. The case was this: The State of Ohio having levied a tax upon the branch of the bank of the United States located in that state, which the bank refused to pay, Osborn, auditor of the State of Ohio, was about to proceed to collect said tax by seizure of the money of the bank in its vaults, and an amended bill alleged that he had seized $100,000 and, while aware that an injunction had been issued by the Circuit Court of the United States

on the prayer of the bank, the money so seized had been delivered to the state treasurer.

One of the objections to the jurisdiction of the court was the conceded fact that the State of Ohio, though not made a party to the bill, was the real party in interest; that all the parties sued were her officers, concerning acts done in their official character and in obedience to her laws. It was conceded that the state could not be sued, and it was earnestly argued that what could not be done directly could not be done by suing her officers. It was insisted that, while the state could not be brought before the court, it was a necessary party to the relief sought, namely, the return of the money and obedience to the injunction.

The Supreme Court of the United States affirmed the decree ordering a restitution of the money, and, in its opinion said:

> "If the State of Ohio could have been made a party defendant, it can scarcely be denied that this would be a strong case for an injunction. The objection is that, as the real party cannot be brought before the court, a suit cannot be sustained against the agents of that party; and cases have been cited to show that a court of chancery will not make a decree, unless all those who are substantially interested be made parties to the suit. This is certainly true where it is in the power of the plaintiff to make them parties, but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say that the laws could not afford the same

> remedies against the agent employed in doing the wrong, which they would afford him could his principal be joined in the suit."

The case of *Philadelphia Company* v. *Stimson*, 223 U. S. 605, is an important authority upon this branch of the case. In that case suit was instituted in the Supreme Court of the District of Columbia to set aside certain harbor lines in the harbor of Pittsburgh, so far as they encroached upon land owned by the complainant, and to restrain the Secretary of War from causing original proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed limits. It was alleged in the bill that the lines were established by the secretary unlawfully, although authority therefor was claimed under a certain act of Congress. The bill was demurred to and one of the grounds of demurrer was that "This is virtually a suit against the United States." Upon that point it was said in the opinion:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. (Cases cited.) And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. (Cases cited.) And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred."

It is important to note also that the controversy is not removed from the sphere of the judicial power simply because it relates to actions claimed to have been directed to a war end. If the mere fact of an alleged war purpose makes a controversy inherently nonjusticiable, the principle would apply with greatest force to the action of military commanders under the direction of the commander-in-chief. For while Congress may declare war, it is to the President, as commander-in-chief, to whom is committed, by the Constitution, the direction of military operations. This broad authority, for the actual conduct of the war may not be impaired, even by Congress itself. (*Milligan's case,* 4 Wall. 2, 139.)

Yet, even in the actual zone of conflict, when a military commander takes private property to prevent it falling into the hands of the enemy, or for the purpose of converting it to the public use, the urgent necessity which justified this course is the proper subject of inquiry by the courts. If such necessity is found not to exist, such military commander is a trespasser and cannot justify by showing the orders of his superior officer. The alleged war purpose, even in the actual conduct of campaigns, does not make the controversy nonjusticiable or oust the courts of jurisdiction to inquire whether the property of the citizen has been invaded rightfully. *Mitchell* v. *Harmony,* 13 How. 115.

It is also established that a controversy with respect to the lawfulness of the action of a naval officer in seizing a ship is none the less justiciable

because he was acting under the direct instructions of the President. *Little* v. *Barreme*, 2 Cranch. (U. S.), 170.

In this case it was held that instructions from the President, to a naval officer, to seize property illegally, did not protect the officer from damages. The officer had seized a Danish brigantine under suspicion of violating the Act of Congress, known as the non-intercourse law. The fifth section thereby authorized the President to give instructions to the commanders of the public armed ships of the United States to stop and examine vessels of the United States under certain circumstances. The President issued explicit instructions, which, however, were found to go beyond the authority conferred by the Act of Congress. Mr. Chief Justice Marshall, in delivering the opinion of the court, said:

> "These orders which were given by the executive under instructions of the Act of Congress made by the department to which its execution was assigned, enjoin the seizure of *American* vessels sailing from a *French* port. Is the officer who obeys them liable for damages sustained by this misconstruction of the act, or will his orders excuse him? If his instructions afford him no protection, then the law must take its course, and he must pay such damages as are legally awarded against him; if they excuse an act not otherwise excusable, it would then be necessary to inquire whether this is a case in which the probable cause which existed to induce the suspicion that the vessel was *American*, would excuse the captor when the vessel appeared in fact to be neutral.
>
> I confess the first bias of my mind was very strong in favor of the opinion that though the instructions of the executive could not give a

right, they might yet excuse from damages. I was very much inclined to thing that a distinction ought to be taken between acts of civil and those of military officers; and between proceedings within the body of the country and those on the high seas. * * * I was strongly inclined to think that where, in consequence of orders from the legitimate authority, a vessel is seized with pure intention, the claim of the injured party for damages would be against the government from which the orders proceeded, and would be a proper subject for negotiation. But I have been convinced that I was mistaken, and I have receded from this first opinion. I acquiesce in that of my brethren, which is, that the instructions cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass."

Conclusion.

For the foregoing reasons the writ of error in this case should be dismissed and the judgment of the Supreme Court of North Dakota affirmed.

Respectfully submitted,

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PUBLIC SERVICE COMMISSION OF WYOMING.

PUBLIC UTILITIES COMMISSION OF UTAH.

-11-

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No. 976.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

WALKER D. HINES, as Director General of Railroads, and NORTHERN PACIFIC RAILWAY COMPANY, Plaintiffs in Error,

vs.

STATE OF NORTH DAKOTA, Ex Rel. WILLIAM LANGER, Attorney General.

ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

ARGUMENT OF

JOHN BARTON PAYNE
For Director General of Railroads.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

Walker D. Hines, as Director General of Railroads, and Northern Pacific Railway Company, Plaintiffs in Error, vs. State of North Dakota, ex rel. William Langer, Attorney General.	No. 976.

STATEMENT.

This case involves the power of the President to initiate intrastate rates on railroads being operated by the United States. The Supreme Court of North Dakota in an original proceeding by the State, ex rel. its Attorney General by a vote of 3 to 2 on final hearing issued a decree restraining the Director General of Railroads from collecting intrastate fares and charges initiated as prescribed in Section 10 of the Act of Congress, approved March 21, 1918, called the Federal Control Act. Its action is here by writ of error for review.

THE COMPLAINT.

The gist of the complaint (Transcript 1-5) is (Sec. 3), that Walker D. Hines, Director General of Railroads (successor to William G. McAdoo), is, by virtue of the Acts of Congress of August 29, 1916, and the Federal Control Act, and the Proclamation of the President, in possession and control of the railroad systems of the Country, exercising supervision and control over intrastate as well as interstate business.

That (4) Section 4725, revised code of North Dakota, provides that no railroad corporation may change its fares, rates and charges without first filing its schedules with the Board of State Railroad Commissioners, and (5) no petition asking an increase of rates, has been filed; that (6) on May 25, 1918, William G. McAdoo, Director General of Railroads, issued General Order No. 28, effective June 25, 1918, raising passenger fares and baggage charges, and effective June 10, raised freight rates 25 per cent., without complying with the State statute. That (7), said order so put into effect was unauthorized by, and contrary to, said Acts of Congress and the proclamation of the President and does not affect the transportation of troops, war material, Government supplies, or the issue of stocks and bonds. That in raising the rates the Director General assumed to act under and by virtue of said Acts of Congress, which do not authorize any Federal authority to initiate or put into effect intrastate rates in said State; that said rates and charges are founded upon a misconstruction of the powers delegated by said Acts of Congress; and (8) are unreasonable.

The Director General, by his answer, relies on said Acts of Congress, passed as war measures, the Proc-

lamation of the President taking over the railroads as an instrumentality of the war, the Proclamation of March 29, 1918 (Transcript 12) authorizing the Director General to execute all and singular the powers conferred upon the President, and sets out (Tr. 14) said General Order raising said rates which embraces the certificate showing the necessity for said increase as is contemplated by Section 10 of the Act.

The order provides:

> "Whereas it has been found and is hereby certified to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, and
>
> "Whereas the public interest requires that a general advance in all freight rates, passenger fares, and baggage charges on all traffic carried by all railroad and steamship lines taken under Federal control under an Act of Congress approved August 29, 1916, entitled . . . , shall be made by initiating the necessary rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission under authority of an Act of Congress approved March 21, 1918, etc."

It is also shown that said order was put into effect in June, 1918, as provided therein, and remains in effect, and that large revenues have been collected thereunder, in all the States of the Union.

The validity of this exercise of the war power is therefore presented as a question of law.

ARGUMENT.

I.

We submit:

THE WAR POWERS OF THE CONGRESS ARE LIMITED ONLY BY THE NEEDS OF THE GOVERNMENT. THESE POWERS WERE AMPLE TO AUTHORIZE THE PRESIDENT TO ASSUME FEDERAL OPERATION AND CONTROL OF THE RAILROADS, TO INITIATE RATES AND CHARGES FOR ALL RAILROADS UNDER FEDERAL CONTROL, INTRA AS WELL AS INTER STATE, AND THE ORDER IN QUESTION WAS A VALID EXERCISE OF SUCH POWER.

STATE LINES DO NOT ABRIDGE OR AFFECT THE WAR POWERS OF THE CONGRESS.

The Constitution, Article I, Section 8, paragraphs 11, 12, and 18.

The Federalist, No. 33.

McCulloch v. *Maryland,* 4 Wheaton, 316-405.

The Legal Tender cases, 79-457.

No. 417, *McKinley* v. *U. S.,* and other cases decided at this Term.

This, we believe, is not in terms challenged; and yet the denial to the President of the right to initiate intrastate rates from which so large a part of the revenues for railroad service is derived, calls to mind how intimately the fathers of our country associated the power to make war, with the power to levy money.

On September 17, 1787, after the great convention had completed its work, Washington transmitted a letter from the Convention to the Continental Congress in which the work of the Convention was thus summarized:

> "The friends of our country have long seen and desired that the power of making war, peace and

treaties; that of levying money and regulating commerce, and the correspondent executive and judicial authorities should be fully and effectually invested in the General government of the Union."

1.

THE POWERS OF THE CONGRESS OVER INTRASTATE RATES IS PLENARY WHEN A FEDERAL INSTRUMENTALITY OR NATIONAL PURPOSE IS INVOLVED.

This was made clear in *Regan* v. *Trust Co.*, 154-413, involving the Pacific railroad, chartered under an Act of Congress. The court said:

> "Similarly we think it may be said that conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is nothing in the Act creating this Company which indicates an intent on the part of Congress to so remove it and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State, which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress."

And *Smyth* v. *Ames*, 169-466, involving construction of the Act of 1862 *re Union Pacific Railway*, and rates made by Nebraska:

> "The better interpretation of the Act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective states through which the Union Pacific Railroad might pass with power reserved to Congress to intervene under certain circumstances and fix rates which the corporation could reasonably charge and collect."

2.

When and to what extent the Congress will exercise power over intra rates *re* a Federal instrumentality is for it alone to determine.

This is aptly illustrated by the *Minnesota Rate Case*, particularly pertinent here because the controlling fact of unified control over inter and intra state rates, absent in the Act to Regulate Commerce, is conspicuously present in the Federal Control Act. The Court (230-420) there said:

> "Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic."

In view, therefore, of the unified national control provided by the Congress there is no doubt of the power to initiate intrastate rates.

If this does not follow we have this singular situation: The Government controls the railroads as a war instrumentality, is responsible for all expenses, charges, and the payment of just compensation, while the control over the large revenues arising from intrastate business would be left with forty-eight different States, a calamity the Congress plainly could not have intended.

3.

The power being clear, the question is narrowed to this:

DID THE CONGRESS BY THE ACT OF AUGUST 29, 1916, AND THE FEDERAL CONTROL ACT, AUTHORIZE THE PRESIDENT TO INITIATE INTRA, AS WELL AS INTER STATE RATES ON RAILROADS UNDER FEDERAL CONTROL, AND IS THE ORDER, MADE PURSUANT TO SAID ACTS, VALID?

The contention of the defendant in error to the contrary rests upon a construction counsel attempt to give Section 15 of the Federal Control Act, to the effect that by the use of the words "lawful police regulations", all power to regulate intrastate rates, notwithstanding the particular provisions of Section 10 to the contrary, and the manifest purpose of the whole Act to establish unified national control for war purposes, was reserved to the States.

When the whole act, letter and spirit is considered, the overwhelming conclusion results that the Congress deliberately established a national plan of federal control inconsistent with such an interpretation.

The language is:

> "SEC. 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the *existing laws or powers* of the States in relation to taxation, or *the lawful police regulations* of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

The words "lawful police regulations" as here used designedly have less potency than the words "laws and

powers of the States" used in relation to taxation, and are intended to embrace only such ordinary matters as are commonly referred to as police regulations. Otherwise, there would have been no change in the sentence and "laws and powers" would have been used in reference to the police power instead of the lesser word regulations, as actually used.

This was not an accident; there is a manifest dropping down from the words "existing laws and powers of the States used in relation to taxation" to the words "lawful police regulations", which signify less than existing laws and powers.

4.

We submit that:

THE ACTS OF CONGRESS AND THE PRESIDENT'S PROCLAMATION PLAINLY CONTEMPLATE AND PROVIDE FOR THE OPERATION OF THE RAILROADS AS A UNIFIED AND COORDINATED NATIONAL SYSTEM OF TRANSPORTATION FOR WAR PURPOSES, WITH POWER TO THE PRESIDENT TO INITIATE RATES; INTRASTATE RATES BEING NECESSARILY INCLUDED IN THE WORDS "RATES, FARES, CHARGES, CLASSIFICATIONS, REGULATIONS, AND PRACTICES" AS USED IN SECTION 10 OF THE ACT.

The President acting under the Act of 1916, by his proclamation, empowered the Director General to operate and control the systems of transportation as a war instrumentality freed from the restraint of state statutes, when necessary.

The Congress following generally the Proclamation, provided for a single uniform and coordinated operation and control.

To accomplish this, unity of rate-making was essential and was in terms provided by Section 10, all rates to be initiated by him subject to a review by the Interstate Commerce Commission, and in its review the Commission was required to give consideration to a certificate of the President reciting the needs of the Government for revenues as specified in the Act, adequate to meet the expenses of such unified operation.

This is clear from the Federal Control Act, and was emphasized by the President in his statement accompanying the Proclamation.

The President said:

> "This is a war of resources no less than of men, perhaps more than of men, and it is necessary for the complete mobilization of our resources that the transportation systems of the country should be organized and employed under a single authority and a simplified method of coordination which have not proved possible under private management and control."

There was no more room for two separate systems of rate-making, than for separate systems of operation, which experience had shown to be a failure.

The phrase, therefore, "lawful police regulations" must be read in the light of this national plan and purpose and such effect given to it as is consistent with the entire Act, rather than such a construction as will destroy the spirit and purpose of the Act and at this late day give to the words an exaggerated and artificial meaning.

II.

THE BASIC ACTS.

The national purpose will be clear as we consider the basic acts:

The first, was the *"Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916,* containing this provision:

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

When this was passed, the world war had been in progress two years. Seven months thereafter (April 6, 1917), war with Germany was declared; and on December 7, 1917, with Austria-Hungary. The demand over there for men, money, food and war supplies was insistent and persistent.

By December the severest winter known for a generation was upon us. There was a shortage of men due to enlistments in the Army and Navy; to the sending of regiments of railroad men to keep the transportation systems of France in operation; there was scarcity of motive power because some 5,000 engines had to be sent to France and Russia; the effort to move hundreds of

thousands of troops, and enormous quantities of supplies overseas, congested the terminals until movement was well nigh impossible; priority orders were issued in an effort to expedite movement, but there was no central single authority authorized by law to act. The result was the transportation systems of the country were greatly impaired, and action to meet the emergency was imperative. The Federal control of the railroads was the one answer. But for this there was grave danger that the might and power of the United States could not have been gotten to the theatre of the war, and our vast resources in men and material, and enormous expenditures in preparation would have availed little. The war had truly become a transportation problem.

III.

THE PROCLAMATION.

Accordingly, December 26, 1917, the President by Proclamation, assumed the possession, operation and control, effective at 12 o'clock noon, December 28, 1917, of each and every system of transportation, and the appurtenances thereof, located within the continental United States, consisting of railroads, and owned or controlled systems of coastwise and inland transportation, with terminals, elevators, warehouses, telegraph and telephone lines, operated as a part of such systems to the end that the same be utilized for the transportation of troops, war materials, and equipment to the exclusion as far as necessary of all other traffic thereon, and so far as such exclusive use be not necessary, then in the performance of such other service as the national interest may require, in the business of common car-

riers, and after appointing a Director General to operate the systems, provided:

> "Until and except so far as said Director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to existing statutes and orders of the Interstate Commerce Commission, and to the statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, made by said Director shall have paramount authority, and be obeyed as such."

State statutes were to be controlling only until the Director General found that an order to the contrary was necessary; such an order as is here involved.

IV.

THE FEDERAL CONTROL ACT.

The Congress was then in session, and promptly began the consideration of adequate legal machinery to provide for compensation to the carriers, and the operation and control of the transportation systems as a national unit. In due time the Federal Control Act was passed. The first section provides for an agreement with the carriers; failing in this the carriers are remitted to legal proceedings under Sections 2 and 3. Section 4 provides an added sum by way of interest on the cost of additions, etc., made by the carriers while under Federal control. Five deals with dividends. Six creates revolving fund of $500,000,000 to provide for expenses of operations, payment of compensation, making additions, etc., and for terminals, equipment,

etc. Seven deals with the issue of securities. Eight authorizes the President to execute his powers through such agencies as he may elect, including the Interstate Commerce Commission and any department of the Government. Nine continues in force the Act of August 29, 1916, and confers upon the President added powers to give effect to the Act. Ten deals with actions at law, the removal of causes, etc., and authorizes the President to initiate and the Interstate Commerce Commission to review, rates on all roads under Federal control. Other sections deal with essential matters, even to questions of accounting.

Nowhere is any distinction between interstate and intrastate rates or business mentioned, manifestly, for the reason that the Congress was not dealing with commerce as such, but with war.

The more important Sections may be examined in some detail.

They are:

(1) The President, having in time of war taken over the possession, use, control, and operation (called Federal control) of certain railroads and systems of transportation (called herein carriers) is hereby authorized to agree with any such carrier, that during the period of Federal control it shall receive as just compensation an annual sum, &c.; any railway operating income accruing during Federal control in excess of such just compensation shall remain the property of the United States.

Every such agreement shall contain adequate and appropriate provisions for maintenance, repair, renewals, and depreciation, in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as at the beginning of Federal control.

The provision *re* the short lines is important because Federal control over these had not been assumed. The Congress placed them under Federal control; hence it cannot be claimed that in providing for the initiation of rates by the President and review by the Commission, intrastate roads and intrastate rates and business were overlooked.

This is the language: (Paragraph 7, Section 1.)

> "That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with railroads of which the President has taken possession, or which connections therewith and is engaged as a common carrier, shall be held and considered as within 'Federal control', as herein defined."

Section 10 provides that the carriers are subject to Federal and State laws except as is inconsistent with the provisions of this Act *or with any order of the President,* in terms giving to the President power by an order to supersede both Federal and State laws.

POWER TO INITIATE RATES.

This power is conferred on the President as to all railroads under Federal control, and is subject to no limitation except (a) They must, all conditions considered, be reasonable and just, and (b) are subject to review by the Interstate Commerce Commission; but become effective immediately, the Commission being deprived of its power to suspend, pending final determination.

The transportation systems to be operated under a unified and coordinated national control.

This is further emphasized by the following quotations from Section 10:

"That during Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulation, and practices by filing same with the Interstate Commerce Commission, which said rates, etc., shall not be suspended pending final determination."

"Said rates, fares, etc. etc., shall be reasonable and just and shall take effect at such time, and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation or practice of any carrier under Federal control."

In determining any question concerning any such rates, etc., the Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control, and not in competition.

The machinery is provided, in that the Commission was authorized to make findings and orders as authorized by the Act to Regulate Commerce, provided that when the President shall find and certify to the Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses to pay railway tax accruals and compensation to the carriers operating as a unit, it is necessary to increase the railway operating revenues, the Commission shall take into consideration such finding and certificate by the President, together with such recommendations as he may make.

Section 11 provides penalties for impeding the possession, operation, and control of the railroads, embezzlement, etc., to the same extent as to persons em-

ployed in the regular service of the United States. 12 provides that moneys and other property derived from operations are the property of the United States, and if the revenues are insufficient, the deficit shall be paid from the revolving fund. 14,—Federal control to continue during the war for a reasonable time thereafter not exceeding 21 months, with power to the President to relinquish. 16 declares the Act to be emergency legislation to meet conditions growing out of the war.

This is the plan for unified national control and operation deliberately adopted by the Congress for all railroads during Federal control.

In view of this comprehensive and exhaustive plan of national control is it to be seriously contended in this presence that the words "lawful police regulations", as used in this Act, are to have the effect of striking down and rendering impotent this necessary and adequate national plan so carefully adopted by the Congress and so essential to the needs and to the welfare of the country?

V.

POLICE REGULATIONS, WHAT IS EMBRACED IN, AS USED IN SECTION 15.

Whatever may be included in the words "police powers", as ordinarily used, it is clear that the words "police regulations" are here used in sharp contrast to the words "laws and powers" as applied to taxation; and that the word "regulations" was not intended to include, and did not include the powers of the States over intrastate rates.

The inquiry, therefore, naturally arises what the Congress intended to be embraced therein.

It is to be assumed that the Congress was familiar with the decisions of this Court, and had in mind decisions affecting police regulation. If so, the answer is instant.

For instance:

Cases requiring the fencing of tracks as a prevention against fire, *Missouri Pacific* v. *Humes,* 115-512; the segregation of the races, *Plessy* v. *Ferguson,* 163-537, *Chesapeake* v. *Kentucky,* 179-388; in the interest of safety regulations as to the qualifications of employees, *Nashville, etc.* v. *Alabama,* 128-96, *Smith* v. *Alabama,* 124-465; heating cars, New York, 165-628; questions affecting injuries to employees, *Atchison* v. *Matthews,* 174-96; *St. Louis, etc.* v. *Paul,* 173-404; to require certain stops to be made, *Lake Shore, etc.* v. *State,* 173-385; fumigating cars, Covington, 235-537; and other matters such as grade crossings, bell-ringing, etc., to prevent accidents.

VI.

THE POLICE POWER IS NEVER PERMITTED TO INTERFERE WITH THE NATIONAL PURPOSE OR NATIONAL CONTROL.

The police powers, even if used in Section 15 in the larger sense and not restricted to mere regulations, as the fact here is, would still be in conflict with the letter and spirit of the Federal Control Act and would have to give way to the intention of the Congress, the whole act being considered and effect given to every provision.

Chief Justice Marshall, in *Sturges* v. *Crowninshield,* 4 Wheaton, 122-202, said:

> "The spirit of an instrument * * * is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."

Police regulations if otherwise effective must yield to the national purpose. In *Jacobson* v. *Massachusetts,* 197-11, this pertinent language was used (24):

> "A local enactment or regulation, even if based on the acknowledged police powers of a State, must yield in case of conflict with the exercise by the general Government of any power it possesses under the Constitution, or with any right which that instrument gives or secures."

And in *Railroad* v. *Husen,* 95-465, this Court (471) said:

> "But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government. It was said in *Henderson* v. *Mayor of New York,* 92-259, to 'be clear from the nature of our complex form of government, that whenever the statute of a State invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied it may be to the powers conceded to belong to the States.' "

And by Chief Justice Marshall in *Gibbons* v. *Ogden*:

> "Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers conferred upon Congress by the Constitution."

Unless, therefore, the Congress plainly intended to divide the power to regulate rates, inter and intra state, which it clearly did not, no such result will be read into the Act by construction or interpretation, since this would be plainly to contravene the purpose of the Congress to establish unified national control.

In conclusion, therefore, we earnestly urge that the decree of the Supreme Court of North Dakota be reversed with instructions to dismiss the complaint.

JOHN BARTON PAYNE,
Counsel for the Director General of Railroads.

Office Supreme Court, U. S.
FILED
MAY 2 1919
JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 976.

THE NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES, AS DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,

vs.

THE STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM LANGER, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

BRIEF OF DEFENDANT IN ERROR.

WILLIAM LANGER,
Attorney General;
FRANK E. PACKARD,
W. V. TANNER,
For Defendant in Error.

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BRIEF OF DEFENDANT IN ERROR.

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(1) STATEMENT OF THE CASE.

The nature of the case is thus stated by the Supreme Court of the State (Trans. of Record, p. 20):

"On the application of the above-named plaintiff an alternative writ of mandamus issued out of this court, commanding the defendants to desist from collecting any fares, rates, or charges for carrying passengers, freight, and baggage between points wholly within the State of North Dakota, other than those stated in the schedules on file in the

office of the Board of Railway Commissioners of the State; or that they show cause why they have not done so. The foregoing writ issued in accordance with the prayer of a complaint and petition alleging, among other things not material to be noticed, that, by virtue of an Act of Congress of August 29, 1916, the President of the United States issued a proclamation on December 26, 1917, following which he assumed possession and control of the railroad systems of the United States, and that he has been in such possession since January 1, 1918; that on May 25, 1918, William G. McAdoo, predecessor in office of the defendant Walker D. Hines, as Director General of Railroads of the United States, issued General Order No. 28, whereby he directed the railroads, under his control to put into force and effect on June 10, 1918, certain passenger fares and baggage charges, and on June 25, 1918, certain freight rates, which fares, charges, and rates were in excess of those previously authorized to be collected on the intrastate commerce of the defendant company within the State of North Dakota.

"Separate answers were filed by the railroad company and by the said Hines, as director general. The answer of the railroad company alleges that from December 28, 1917, until on or about August 1, 1918, the director general exercised possession and control of its transportation system through the officers and agents of the defendant company; but that since August 1, 1918, such possession and control have been exercised through various agents appointed by the director general. Denying that the defendant company has any power or authority over the tariffs complained of, it asks that the action be dismissed as to it.

"The answer of the director general sets forth the legal basis relied upon to support General Order No. 28, and asks that the alternative writ be quashed."

The Supreme Court of the State ordered that a peremptory writ be issued in accordance with the views expressed in its opinion (Trans., p. 18).

(2) ACTS OF CONGRESS AND PROCLAMATIONS OF THE PRESIDENT.

In the act of Congress of August 29, 1916, making appropriations for the support of the Army, was a so-called "rider", reading as follows (29 Stat., p. 645):

> "The President, *in time of war* (italics ours), is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the *transfer or transportation of troops, war materials and equipment,* or for such *other purposes connected with the emergency* as may be needful or desirable."

This paragraph was inserted in the Army Appropriation Bill during the outbreak along the Mexican border and prior to the entry of the United States into the war with the Teutonic powers.

On April 6, 1917, Congress, by joint resolution, declared a state of war to exist between the United States and Germany, and authorized and directed the President "to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government" (U. S. Comp. Stat., 1918, Compact ed., p. 17).

On December 7, 1917, by a like resolution, a state of war was declared to exist between the United States and Austria-Hungary (Id., p. 17).

On December 26, 1917, the President issued a proclamation in which, after referring to the declarations of war and the act of August 29, 1916, he states (U. S. Comp. Stat., 1918, Compact. ed., p. 274):

> "It has now become necessary in the national defense to take possession and assume control of certain systems of transportation and *to utilize the same,*

> *to the exclusion as far as may be necessary of other than war traffic thereon, for the transportation of troops, war material and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war* (italics ours)."

The proclamation further recites that the President does thereby, through Newton D. Baker, Secretary of War, "take possession and assume control * * * of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States, and consisting of railroads, owned or controlled systems of coastwise or inland transportation, engaged in general transportation, whether operated by steam or electric power, including also terminals, terminal companies, and terminal associations, sleeping and parlor cars, * * * to the end that such systems of transportation be utilized for the transfer and transportation of troops, war materials, and equipment, to the exclusion, so far as may be necessary, of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers."

The proclamation directs that the "possession, control, operation, and utilization of such transportation systems" shall be exercised through William G. McAdoo, who is appointed and designated Director General of Railroads. The proclamation states:

> "Said director general may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, officers, and employees of said systems of transportation. Until and except so far as said director general shall from time to time by general or special orders otherwise provide, the boards of directors, officers, and employees of the various transportation systems shall

continue the operation thereof in the usual and ordinary course of business of common carriers, in the names of their respective companies.

"Until and except so far as said director general shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes of the United States and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director general shall have paramount authority and be obeyed as such."

The director general is empowered to enter upon negotiations with the several companies "looking to agreements for just and reasonable compensation for the possession, use, and control" of the respective properties.

The payment of dividends and other obligations theretofore declared is authorized, and the payment of dividends and other obligations is provided for subject to the approval of the director general.

The proclamation further states:

"Except with the prior written assent of said director general, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders otherwise determine."

Thereupon the director general took over the transportation systems specified in the proclamation.

On March 21, 1918, Congress adopted what is known as the "Federal Control Act." This act is entitled: "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their

owners, and for other purposes." As disclosed in its title, the act treats the taking over of the railroads as *having been accomplished* and deals with (1) the operation of the systems; (2) the compensation of the owners of the properties; and (3) other matters incident to Federal operation (U. S. Comp. Stat., Compact Ed., pp. 456-60).

Section 1 of the act provides:

> "The President, *having in time of war taken over* (Italics ours) the possession, use, control, and operation (called herein Federal control) of *certain railroads* and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier * * * that it shall receive as just compensation an annual sum * * * ."

Section 2 provides for the payment of compensation in cases where no agreement is made.

Section 3 provides for arbitration upon the question of compensation in case of inability to agree, and for suits in the Court of Claims.

Section 4 relates to increases of compensation on account of betterments, extensions, etc.

Section 5 limits the amount of dividends that may be paid without the approval of the President.

Section 6 appropriates the sum of $500,000,000, which, together with the operating revenues of the carriers, is to be used as a revolving fund for the purpose of paying the expenses of Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment.

This section also covers the subject of additions and improvements, either by the carrier or by the President.

Section 7 relates to the funding of maturing obligations of the carriers and the issuance of further obligations by the carriers with the approval of the President.

Section 8 confers upon the President the power to desig-

nate the agencies by whom Federal control shall be exercised. This section reads as follows:

> "That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and co-operation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law."

Section 9 provides that the act of August 29, 1916, "shall remain in force and effect except as expressly modified and restricted by this act," and provides that the President, in addition to the powers conferred by this act, "shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred."

Section 10 reads:

> "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the

Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall, upon motion of either party, be retransferred to the court in which it was originally instituted. But no process, *mesne* or final, shall be levied against any property under such Federal control.

"During the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and

> equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

Section 11 prescribes the penalties for violations of the act.

Section 12 relates to the disbursement of the operating receipts of the carriers, the payment of taxes, accounting, etc.

Section 13 relates to pending suits under the Sherman Anti-Trust Act.

Section 14 defines the period of Federal control and limits such Federal control to one year and nine months following the ratification of the treaty of peace.

Section 15 provides:

> "Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

Section 16 declares the act "to be emergency legislation enacted to meet conditions growing out of war."

Following the passage of the Federal Control Act of March 21, 1918, and on March 29, 1918, the President issued a proclamation (U. S. Comp. Stat. 1918, Compact Ed., p. 458) which is in effect a general power and authority conferring upon William G. McAdoo, Director General of Railroads, "either personally or through such divisions, agencies, or persons as he may appoint" to make agreements with the carriers, "to issue any and all orders which may in any way be found necessary and expedient in connection with the

Federal control * * *, and generally to do and perform all and singular all acts and things, and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform."

The act of August 29, 1916, the proclamation of December 26, 1917, and the act of March 21, 1918, are printed in Appendix I.

ARGUMENT.

(3) THE WAR POWERS OF CONGRESS AND THE PRESIDENT.

That the power of Congress and of the President in respect to the taking over of railroads has its source in the "war powers" of the Government, will probably not be questioned. The powers of Congress are derived from several constitutional sources:

(1) The power "to raise and support armies; but no appropriation of money to that use shall be for a longer term than two years" (art. 1, sec. 8, subd. 12);

(2) The power "to provide and maintain a navy" (art. 1, sec. 8, subd. 13);

(3) The power "to make rules for the government and regulation of the land and naval forces" (art. 1, sec. 8, subd. 14);

(4) The power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions" (art. 1, sec. 8, subd. 15);

(5) The power "to declare war" (art. 1, sec. 8, subd. 11);

(6) The power "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States" (art. 1, sec. 8, subd. 16);

(7) The power "to * * * provide for the common defense and general welfare of the United States" (art. 1, sec. 8, subd. 1);

(8) The vesting in Congress of "all legislative powers" (art. 1, sec. 1);

(9) The power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof" (art. 1, sec. 8, subd. 18).

The authority of the President in relation to the transportation systems is such as is conferred upon him by and from any one or more of the following sources:

(1) The provision vesting "the executive power" in the President (art. 2, sec. 1, subd. 1);

(2) The provision that "he shall take care that the laws be faithfully executed" (art. 2, sec. 3);

(3) The provision that "the President shall be commander-in-chief of the army and navy of the United States, and the militia of the several States" (art. 2, sec. 2, subd. 1);

(4) The provisions of the acts of August 29, 1916, and March 21, 1918, respectively.

That officers of the United States, even to the President, in the discharge of their duties, are amenable to the laws for their conduct, is made very clear in one of the earliest cases which came before this court. The decision of the court in *Marbury vs. Madison*, 1 Cranch, 137; 2 L. Ed., 60, has since been followed in every case involving the same question. The court said (p. 165):

> "By the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

"In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.

"But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested right of others.

"The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."

And (page 169):

"With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites

some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this the assertion, by an individual, of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.

"It is scarcely necessary for the court to disclaim all pretensions to such jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the Constitution and laws, submitted to the executive, can never be made in this court.

"But, if this be not such a question; if, so far from being an intrusion into the secrets of the cabinet, it respects a paper which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim, or to issue a mandamus directing the performance of a duty, not depending on executive discretion, but on particular acts of Congress, and the general principles of law?

"If one of the heads of departments commits any illegal act, under colour of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?"

Neither can it be claimed that the existence of a state of war enlarges the power of Congress or of the President, or in any way impairs the force or effect of constitutional or statutory provisions defining or controlling the scope of such power. The character of the war powers of Congress and of the President were long ago expressed in the following language (*Ex parte* Milligan, 4 Wal., 2-120 18 Law Ed., 281):

> "Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of Government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."

And further (p. 124):

> "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, de-

stroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish.

"This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written Constitution the safeguards which time had proved were essential to its preservation. Not one of these safeguards can the President or Congress or the judiciary disturb, except the one concerning the writ of habeas corpus."

(4) THE RIGHT TO MAINTAIN THE SUIT AGAINST THE NORTHERN PACIFIC RAILWAY COMPANY

The defendant Northern Pacific Railway Company contends that because it no longer has possession and control of its property, the suit as to it should be dismissed. Section

10 of the Federal Control Act of March 21, 1918, contains the following provisions:

> "*Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law* (Italics ours); and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or any Act of Congress or official order or proclamation relating thereto shall upon motion of either party be retransferred to the court in which it was originally instituted. But no process, mesne or final, shall be levied against any property under such Federal control."

It is our contention that under this provision the Northern Pacific Railway Company is the necessary and proper party defendant in this suit; in other words, that within the purview of this section the Northern Pacific Railway Company is the "carrier."

It is apparent that Congress intended to preserve the right to sue. The defendant railway company, however, asserts that since its operating property has passed under Federal control the right to maintain suits against the corporation in cases involving the operation of its transportation system no longer exists.

If the provisions of the section are to be accorded any force whatever, this contention would leave but one alternative, namely, that suits involving the conduct of railroads under Federal control must be brought against the President, the Director General, or some subordinate Federal agent.

This brings us to the question of the intention of Congress by the use of the language above quoted.

We believe that it is manifest from that language (without reference to other parts of the act) that the word "carrier" as used in this section refers to the railroad corporation. It will be noted that under the second sentence of the provision "such carrier" (*i. e.,* the "carrier" who may be sued at law or in equity) may not have "any action *heretofore or hereafter* instituted" transferred to a Federal court. Obviously, suits instituted prior to Federal control would be instituted either by or against the railway corporation, and in making provision with respect to such suits the railway corporation alone could be referred to as the "carrier." Here we find the word "carrier" used with respect to suits instituted subsequent to Federal control. Clearly the word cannot have a different meaning in respect to the latter class of actions than must necessarily be given to it with respect to the former. And since the expression "such carrier," used in the second sentence, refers to the word "carrier" as used in the first sentence, it follows that the word refers to the railroad corporation throughout the provision relating to the bringing of actions.

The effect of this provision is to create the railroad corporation the agency of the railroad administration for the purpose of bringing and defending law suits concerning the operating properties of that particular corporation. Nor can such a provision create any difficulty in the matter of the Federal control of railroads. The director general may promulgate such rules and regulations as in his judgment will be conducive to the proper conduct of any litigation involving the exercise of his functions.

That this is the proper interpretation of the word "carrier" is the more apparent when reference is made to the other provisions of the Federal Control Act. It is a primary rule of statutory construction that a word used in the legislative act is to be deemed to have the same meaning wherever used in the act, unless a different meaning is manifestly intended by the legislature.

When we turn to the other provisions of the Federal Control Act it is very clear that when the word "carrier" is used the particular railroad corporation under Federal control is meant.

Section 1 treats of agreements with "any such carrier making operating returns to the Interstate Commerce Commission," *i. e.*, railroads and systems of transportation under Federal control. Since the director general acts for the President in making such agreements, it is clear that the railroad corporation is the carrier within the meaning of this section. Moreover, no agency other than the railroad corporation makes operating returns to the Interstate Commerce Commission.

Section 2 provides for payment of compensation to "any carrier while under Federal control," in the absence of agreement. Here also, obviously, the railroad corporation is referred to.

Likewise, in section 3 referees are to be appointed "on the application of the President or of any carrier," to act in the matter of fixing compensation.

Section 4 speaks of "the cost of road extensions to the property of *such carrier* made by such carrier with the approval of or by order of the President while such property is under Federal control." Again we not only find the word "carrier" used in the sense of owning the transportation system, but we also find it regarded as having authority to make additions and betterments, even during the period of Federal control, with approval of the President or in pursuance of his order.

By section 5 the "carrier" may pay dividends in certain cases without the approval of the President. Here also the reference is to the railroad corporation, not to the director general.

Section 6 refers to the "operating income of said carriers," and to the use of the same in paying the expenses of Federal control, just compensation, providing for terminals, equipment, and other purposes, as may be directed.

This section also contemplates the making of additions, betterments and extensions "necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier." So, again, the word "carrier" is used in respect to such additions and betterments, and it is provided that the revolving fund created by the section may be advanced "to *such carrier* * * * to pay for additions, betterments, and equipment so ordered (by the President) and constructed by *such carrier* or by the President * * * ."

Again, reference is made to losses "claimed by any carrier" by reason of any such additions, betterments, or extensions ordered by the President.

The obligations which the "carriers" are authorized to issue during the period of Federal control can only mean the obligations of the railroad corporations (sec. 7).

By section 9 the act is made applicable "to any carriers to which Federal control may be hereafter extended." Thus, the word "carriers" is used in the sense of railroad corporations not yet under Federal control.

Similarly, in section 11 "every * * * corporation, whether *carrier* or shipper * * * is punishable for a violation of the act."

Section 12 refers to "moneys and other property derived from the operation *of the carriers* during Federal control."

The word "carriers" is found in other provisions of the act, always used in the same sense; but we believe we have referred sufficiently to specific provisions clearly indicating that the term is used in each instance as synonymous with "railway corporations," or of the corporate entity as distinguished from the Railroad Administration.

It therefore follows that under the provisions of section 10, giving the right to maintain actions at law or suits in equity against "such carriers," suits may be maintained against the railroad corporations.

Under the act of Congress the corporation is made an agent

of the Government. The Government is not the proprietor of the railroad system. It is merely exercising a certain control over the system for the emergency. The extent of that control and the agencies through which it shall be exercised are questions for the determination of Congress, and we submit that its intent with respect to suits is unmistakable.

Since the "taking over" of the railroads by the Federal Government both the railroads and the railroad administration have insisted that the right to sue the railroad corporations no longer existed, at least so far as causes of action arising from the operation of the transportation systems are concerned. Indeed, in his proclamation of December 26, 1917, the President attempted to vest in the director general the power to control litigation. That proclamation recites that "suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as the director general may, by general or special orders, otherwise determine."

So far as we have been able to find, the case of *Muir vs. L. & N. R. Co.*, 247 Fed., 888, is the only reported case in which the nature of the Federal control of railroads prior to the passage of the Federal Control Act is discussed. The action was one for personal injuries arising out of an accident occurring before the taking over of the railroads, but begun subsequent to the date of Federal control. The court considered the nature of Federal control during the period following the President's first proclamation and prior to the adoption of the Federal Control Act of March 21, 1918. Discussing the act of August 29, 1916, and the initial proclamation of the President, Evans, District Judge, said (p. 894):

> "The statute authorized the President (*a*) in time of war, (*b*) through the Secretary of War, (*c*) to take, possess, and assume control, (*d*) of any system of transportation, to the exclusion, if necessary, of any other transportation thereon, (*e*) for the

transfer or transportation of troops, war material, and equipment, and for such other purposes connected, (*f*) with the emergency as may be needful or desirable. Under no established rule of interpretation can it be doubted that it was the intention of the legislative body to authorize, in time of war, the War Department and no other to take over the railroads for war purposes, such as transportation of troops and war material, and for such other purposes as might be desirable in the emergencies of war. Besides being an appropriate function of the War Department, it was the plain meaning of the statute which Congress enacted that the War Department should have authority over it, and even if we assume (which is inconceivable) that the Secretary of War declined for that department to take up the war work indicated, we find nothing in the statute which authorizes it to be taken up by the Treasury Department, nor by a Director General of Railroads; Congress not having intrusted the work to either. And the situation, if strict rules were to operate, might involve consideration of the question whether the rule stated by the Supreme Court in *Smith vs. Black,* 115 U. S. at page 319, 6 Supreme Court, 56; 29 L. Ed., 398, to the effect that, 'where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person,' would not apply."

It was insisted by the defendant railway company that a suit would not lie in the State court because the railroad was in the possession and under the control of the director general and hence the cause was one arising under the laws and Constitution of the United States. In disposing of this contention, the court said (p. 895):

"Certainly the proposition is so well established as to be elementary that Congress may authorize heads of departments or other officers to make regulations within certain limits, and, when made within those limits, such regulations have the force and effect of law, and may be enforced as such; but it has often been held that the delegation of authority to make

> regulatory orders gives no power to add to, take from, or modify the limitations prescribed by Congress. * * *
>
> "On its face the act of August 29, 1916, does not give authority to the President to make or promulgate a proclamation of any character. No one, however, could or would contend that he had not abundant authority to issue such documents whenever he thought it proper to give notice or information to the public. But such papers cannot have any effect as laws, in the absence of express constitutional or congressional authorization. * * *
>
> "The proclamation designated Mr. McAdoo as Director General of Railroads. This position being unknown to the law, its powers are not fixed; but we suppose it was the intention to make him, not only a member, but the head, of the board of directors of each railroad company * * *."

After quoting the language of the proclamation relating to suits, the court says (p. 896):

> "We find no statutory warrant for this provision in the proclamation, and especially none for the exception mentioned in the last clause of it. We may, however, ignore that exception, because nothing appears to show any attempt to carry it into effect; but, even if we suppose that the other limited interruption of the rights of litigants while the war goes on should be patriotically accepted by all good citizens, litigant and otherwise, it by no means follows that the law authorizes any interference with the course of judicial procedure between litigants before the time arrives when there might be attempts to seize, under execution issued upon final judgments, property in the temporary possession of the United States under the proclamation."

The motion to remand the case to the State court was granted. Thus the court squarely held that during that period of Federal operation prior to the adoption of the Federal Control Act the railroad companies were subject to suits at law.

The Federal Control Act was adopted March 21, 1918, subsequent to the decision in *Muir vs. L. & N. R. Co., supra.* Undoubtedly, Congress, in making the provision for the maintenance of suits against the carriers contained in section 10 of the Federal Control Act, had in mind the attitude of the Railroad Administration with respect to litigation arising during the period of Federal control and the decision of the court in the *Muir* case was within the legislative cognizance.

That Congress did have this knowledge is shown by the provision in section 10 for the retransfer of suits removed to the Federal court during the period of Federal operation prior to the act of March 21, 1918. With this knowledge Congress provided for suits against the carriers. We submit that the Northern Pacific Railway Company is a proper party defendant.

(5) THE FEDERAL CONTROL ACT DID NOT ABROGATE THE LAWS OF THE STATE RESPECTING THE ESTABLISHMENT AND REGULATION OF RATES.

The Board of Railroad Commissioners of North Dakota was created by section 82 of Article 3 of the Constitution of the State (section 579, Comp. L. of North Dakota, 1913).

By section 4724 (*Id.*) every railroad is required to print and keep for public inspection, schedules showing the rates and fares for the transportation of persons and property which such railroad has established.

In section 4725 (*Id.*) it is provided:

> "No advance shall be made in the rates, fares, and charges, which have been established and published as aforesaid by any railroad * * * except after ten days' notice in writing to the commissioners of railroads which shall plainly state the changes proposed to be made in the schedules then in force and the time when the increased rates, fares, or charges will go into effect * * *."

Chapter 199 of the laws of North Dakota of 1907 (Laws 1907, p. 327, Comp. L. North Dakota, section 4796) established maximum passenger rates.

The constitutional provisions and the statutes above referred to are printed in full in Appendix No. 2.

The question is whether or not these and other similar provisions of the laws of the State will be abrogated or suspended during the period of Federal control by the act of August 29, 1916, or the act of March 21, 1918, or whether they may be abrogated or suspended by the President or his agencies.

(*a*) State powers as to railroads built for war purposes.

In the light of the decisions on Federal control of private property for war purposes, is the continued exercise of the power of the State or the continued application of its laws over intrastate rates, other than for the transportation of "troops, war material, and Government supplies" so inconsistent with the provisions of the emergency act to secure such control and meet conditions growing out of the war that the State is to be deemed divested of its power and authority, and State laws controlling and regulating intrastate matters rendered subject to the orders of the Railroad Administration?

The extent to which the exercise of State powers for State purposes is subordinate to national powers has been clearly indicated by a number of decisions of this court. These cases generally involve railroads built under acts of Congress and aided by Government lands and bonds for the purpose of securing the use and benefit of such railroads for postal and military purposes. Nearly all of the cases to be examined in this connection have to do with railroad corporations organized under the Act of Congress of July 1, 1862.

Before entering upon a discussion of these cases, attention should be given to the early decisions fixing the boundary of Federal and State powers.

In *McCullough vs. Maryland*, 4 Wheaton, 316, Chief Justice Marshall laid down the rule that the States were forbidden by the Federal constitution from taxing agents or instrumentalities of the Federal Government, but that they might tax the property of such agents or instrumentalities, clear distinction being made between the acts and the property of such agents and instrumentalities. The case involved a branch of the United States Bank and the attempt of the State of Maryland to tax its notes. The tax was intended to drive the branch bank out of Maryland and the tax upon the different denominations of notes was excessive.

The same rule was laid down in *Osborne vs. Bank*, 9 Wheaton, 738, where the State of Ohio attempted to drive out a branch of the United States Bank by levying a tax upon its right to do business in the State. This tax was so exorbitant as to amount to an inhibition upon the transaction of business by the bank within the State. In these two decisions Chief Justice Marshall laid down the rule that the agents and instrumentalities of the Federal Government should not be impeded or hampered in their activities by the interference of State authority.

The first decision directly in point, but controlled by these two decisions, was that of *Thompson vs. U. P. R. Co.*, 9 Wallace, 578; 76 U. S., 792, where an attempt was made by the State of Kansas to tax the property of the Union Pacific Railroad Company which had been constructed by a corporation organized under the authority of Congress. The provisions of the charter were not unlike the provisions in the charter of the United States Bank which was construed to be an instrument of the Federal Government in *McCullough vs. Maryland* and *Osborne vs. Bank, supra*. The Government was not a stockholder in the railroad as in the bank, but it loaned its credit to it and made it large grants of land.

A right of way had also been granted and the right to secure material from adjacent lands was among the privileges conferred. The corporation was obligated to keep its lines of railroad and telegraph in repair and give precedence to Government matters, transportation of troops, or war materials and war munitions, etc. It was held that, although the corporation was an agent and instrumentality of the Federal Government, that it was subject to taxation by the State.

The leading case, however, in the construction of the Act of July 1, 1862, was that of *Union Pacific Ry. Co. vs. Peniston*, 85 U. S., 5; 21 Law Ed., 877, decided in 1873. This act was entitled, "An Act to Aid in the Construction of a Railway and Telegraph Line from the Missouri River to the Pacific Ocean and securing to the Government the use of the same for Postal, Military, and other purposes," and authorized certain persons, named in the act, together with five commissioners to be appointed by the Secretary of the Interior, and their associates and successors, as a body corporate, by the name of the Union Pacific Railroad Company, with perpetual succession, to lay out and construct, furnish, maintain and enjoy continuous railroad and telegraph service from the western boundary of the State of Iowa to the western boundary of the Nevada territory, with connections reaching to the Pacific coast. The act gave to the company a right of way through the public lands and the use of materials for completing the road to be found on adjacent lands. The road was completed and opened for service in 1869 and with the Central Pacific formed a continuous line from the Missouri river and the east to the Pacific coast.

The corporation was the creature of Congress. It received large aid from the general Government both in donations and loans; the President appointed five of its directors; annual reports were to be made to the Secretary of the Treasury; all the operations of the company in laying out, constructing and working its railroad and telegraph lines, as

well as its rates, were subject to the regulations imposed by its charter (whenever its net earnings exceeded ten per cent, the Government might regulate its rates); and upon failure to comply with the terms and conditions imposed by the charter or to keep the road in repair and use, Congress could assume the control and management and devote the income to the payment of its Government bonds. Money was loaned to the corporation by the United States to the extent of many millions of dollars and became a lien on all its property. And on failure to redeem its bonds, the Secretary of the Treasury was authorized to take possession of the road with all its rights, functions, immunities, and appurtenances for the use and benefit of the United States and, finally all the grants made to the company were declared to be upon condition that besides paying the Government bonds, the company should keep the railroad and telegraph lines in repair and use and should at all times transmit dispatches and transport mail, troops and munitions of war, supplies and public stores for the Government whenever required to do so by any department thereof, and that the Government should have the preference at rates not to exceed those charged to private parties and payable by being applied to the payment of bonds due the United States; and in addition to all this control by Congress and the obligations and liabilities of the company, Congress reserved the right to alter, amend, or repeal the charter.

The case arose upon a bill in equity to set aside a tax levied against the Union Pacific Company by the county of Lincoln in the State of Nebraska, the plaintiff corporation contending that the tax levied upon its property in Nebraska was in effect a tax levied upon the agents and instrumentalities of the Federal Government and in conflict with the rule laid down by Chief Justice Marshall in *McCullough vs. Maryland* and *Osborne vs. Bank*. Mr. Justice Strong rendered the prevailing opinion of the court, stating the purposes and provisions of this extraordinary charter to be "a

supervision and control of the road and telegraph line with the avowed purpose of securing to the Government the use and benefit thereof for postal and military purposes." Continuing, the court said:

> "Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the Government. The ownership is in the complainants, a private corporation, though existing for the performance of public duties. The Government owns none of its stock, and though it may appoint five of the directors, the right thus to appoint is plainly reserved for the sole purpose of enabling the enforcement of the engagements which the company assumed, the engagements to which we have already alluded. Admitting, then, fully, as we do, that the company is an agent of the general Government, designed to be employed, and actually employed, in the legitimate service of the Government, both military and postal, does it necessarily follow that its property is exempt from State taxation?"

The question here propounded is answered in part by the court:

> "It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers."

Mr. Justice Swayne, concurring in the prevailing opinion, found the intention evinced by Congress to be:

> "I see no reason to doubt that it was the intention of Congress not to give the exemption claimed. The

> exercise of the power may be waived. But I hold that the road is a national instrumentality of such a character that Congress may interpose and protect it from State taxation whenever that body shall deem it proper to do so."

The right of way of the Union Pacific Railroad Company was a gift from the Federal Government and it was contended by the railroad in *Union Pacific Ry. Co. vs. Burlington & Missouri River Ry. Co.*, 3 Fed., 106, that the right of way of the former railroad was the property of the Federal Government, set apart for its use and that it was exempt from the operation of the laws of the State of Nebraska respecting crossings, connection with other railroads and the condemnation of property for such purposes under the State law of eminent domain. The United States Circuit Court for the district of Nebraska said:

> "I am clearly of the opinion that the right of way of the Union Pacific Railway is not property of the Federal Government set apart for its own public use, so as to exempt it from the operation of the law of the State of Nebraska, above quoted, respecting the crossing and connecting of railroads, and the condemnation of property for those purposes. It is the property of the corporation acquired under a law of the United States. If, however, it were conceded to be the land of the United States, unless held for governmental purposes, it would, even in that case, be subject to the State's power of eminent domain. Land * * * not used for any of the purposes of the national government, may be taken by the State for public use. U. S. *vs.* Railroad Bridge Co., 6 McLean, 517.
>
> "It has been held by the Supreme Court of the United States that the Pacific Railroad is subject to state taxation. The Railroad Company *vs.* Peniston, 18 Wall., 5. It was insisted in that case that the Pacific Railroad was created by Congress for public

> and national purposes, and that, like a national bank, it was an instrument of the General Government, and not subject to State jurisdiction for purposes of taxation. But this position was not sustained. It is difficult to see upon what principle property can be held to be so exclusively within the Federal jurisdiction as to be beyond the reach of the State's power of eminent domain, and yet subject to State taxation."

Here we note a widening of the power to tax into that of regulation by State authority.

The act of July, 1862, provided that railroads then incorporated or thereafter to be incorporated should have the right to connect their road with the Union Pacific system, "at such places and upon such just and equitable terms as the President of the United States shall prescribe." It was contended by the railroad company in *Union Pacific Ry. Co. vs. Leavenworth N. & S. Ry. Co.*, 29 *Fed.*, 728, that this provision of the charter exempted the Union Pacific Railroad from the exercise of the power of eminent domain by the State of Kansas and from the laws of the State respecting the crossing and connecting of railroads and the condemnation of property for these purposes. The court held that the act of Congress providing that physical connection should be made by direction of the President did not prevent the State from compelling physical connection and exercising the power of eminent domain.

It would be difficult to see how the validity of State regulation of the Union Pacific Railway, a corporation organized by Congress—an instrumentality brought into being by the Federal Government for the primary purpose of securing to the Government the use and benefit of a road and telegraph line for military and postal use, could be brought to a clearer issue. The broad regulatory powers of the State were recognized and upheld and limited only when the enforcement of the regulations in any particular case deprived the railroad of the power to serve the Government, as the road

was intended to serve it—when the regulations hindered the efficient use of it for military and postal service. The regulations and the right to tax, were found not to have such a necessary effect, but left the railroad free to discharge the duties placed upon it by the Federal Government. Although it was said in the Peniston case that a tax upon the property of a railroad was not a direct obstruction to the exercise of Federal powers, and although the State regulations which were upheld, did in fact affect the operation of the railroad company, yet, they did not in such a way as to affect adversely its serviceability as a Federal agent; that State regulations affected the Federal use of the railroad was not enough, the effect must be an interference and an impediment.

The power to regulate and the power to tax are inherent in sovereignty—the power to tax being the more drastic of the two. Therefore, as the power to tax may be exercised in respect to the agency or instrumentality of the Federal Government, the power to regulate can likewise be exercised by the State. This was the rule laid down in *Reagan vs. Mercantile Trust Co.*, 154 U. S., 413; 38 Law Ed., 1030, decided in 1893. It is a companion case to Reagan *vs.* Farmers' Loan & Trust Co., decided at the same time, and involves the validity of the act of the legislature of Texas creating a Railroad Commission with power to regulate rates. In the Reagan case, the Texas & Pacific Railway, a corporation organized under the laws of the United States, insisted that it was not subject to the control of the State even as to rates of transportation wholly within the State. Mr. Justice Brewer, speaking for the court, said (pp. 414-15).

> "We are of the opinion that the contention of the Railway and Trust Companies cannot be sustained, and that the reasoning in the cases of Thomson *vs.* Union Pac. R. Co., 9 Wall., 579, and Union Pac. R. Co. *vs.* Peniston, 18 Wall., 5, 36, leads to this conclusion."

After quoting from the opinion of Mr. Justice Strong in the Peniston case, as above excerpted, he said (pp. 416-417):

> "Similarly we think it may be said that, conceding to Congress the power to remove the corporation in all its operations from the control of the State, there is in the act creating this company nothing which indicates an intent on the part of Congress to so remove it, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the State to other points also within the State, and that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to Congress. It must have been known that, in the nature of things, the control of that business would be exercised by the State, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from State control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of the legislature of the State, passed in 1873 in respect to it, we are of the opinion that the Texas and Pacific Railway Company is, as to business done wholly within the State, subject to the control of the State in all matters of taxation, rates, and other police regulations."

In brief, that in the absence of an express exemption from State control, it must be assumed that Congress intended the

corporation to be subject to the ordinary control exercised by the State.

In Smyth *vs.* Ames, 169 U. S., 466; 42 Law Ed., 819, decided in 1897, the Union Pacific Ry. Co. contended that a statute of the State of Nebraska involving railroad rates was unconstitutional as direct interference with a Government agent and instrumentality. The court said (pp. 521-2):

> "Undoubtedly Congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the States through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits.
>
> "It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a State, is a subject primarily within the control of that State. And it ought not to be supposed that Congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the States through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective States through which the Union Pacific Railroad might pass, with power reserved to Congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power, we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a State prescribing rates for transporting property on that road wholly between points within its territory. Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made

> of authority to add to, alter, amend, or repeal that act, prescribes the rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

We think it a fair inference from the decided cases, to assume that the rail control acts involve no question of conflict between State and Federal powers. The conduct of the war is a national duty carried out by the central government. When the State, in dealing with internal commerce, undertakes to regulate interstate agencies or instrumentalities, the States are not permitted directly to limit or restrain that, which, from its nature, should be governed in the manner that the national legislature constitutionally ordains.

The power of Congress to regulate commerce among the several States is plenary, and if a State enactment imposes a direct burden upon, and an actual interference with, interstate commerce or other national concerns, it falls, irrespective of Federal legislation. If the State regulation of its intrastate concerns does not burden, impede or interfere with, but merely affects the national concern, the State authority is unimpaired. Minnesota Rate cases, 230 U. S., 352, 398, 400 and 411.

As it is plainly indicated by the decisions above quoted, the fact that the railroads are instrumentalities of interstate commerce does not preclude the exercise by the State of powers establishing regulations governing their internal commerce, provided that they do not burden interstate commerce, and the fact that they are temporarily agents of the national government to execute national policies in war time, does not exempt them from State regulation. The national power exercised for the enactment of national measures in war time emergencies is paramount, but the question here is not merely one of the existence of inherent power either in the national government or in the States, but the purpose manifested by Congress to exert its powers to the exclusion

of that of the States. In matters growing out of the war emergency, for which Congress deemed it necessary to prescribe regulations, there can be no question that the national powers are paramount and exclusive—whether these matters involve interstate commerce or the employment of other agencies for the execution of constitutional functions; but in so far as these instrumentalities are employed only in the purely local concerns of the State, regulatory power is reserved to the State authority.

(*b*) The Federal Control Act is not inconsistent with the laws of the State.

We have shown that the mere fact that a railroad may be an agency of the Federal Government for military or other purposes, does not necessarily exempt such railroad from State authority. Let us now examine the provisions of the Federal Control Act and the laws of the State to determine whether or not they are in conflict to the point of inconsistency or whether they may be reconciled; for, after all, this is the test to which this legislation must finally be submitted. The question of the extent to which the laws of the State have been superseded by the acts of Congress must be determined from the nature of the provisions of each and the extent to which they are in conflict.

This court has repeatedly announced the rule that the question of conflict is to be determined by the ordinary rules of statutory construction and that it should not be held that the State legislation has been superseded except in cases of manifest repugnancy.

In the case of *Reid vs. Colorado,* 187 U. S., 137-48, the court said:

> "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly

> manifested. This court has said—and the principle has been often reaffirmed—that in the application of this principle of supremacy of an act of Congress in a case where the State law is but an exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together. *Sinnot vs. Davenport,* 22 How., 227, 243."

Again, in *Missouri, &c., Co., vs. Haber,* 169 U. S., 613-23:

> "May not these statutory provisions stand without obstructing or embarassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together."

It will hardly be contended that the act of August 29, 1916, operates to abrogate, repeal or suspend the provisions of law, Federal and State, relating to the publication and establishment of rates, except as such laws may be affected by the utilization of the railroads "to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

In any event, the question of the effect of Federal control must be determined from a consideration of the act of August 29, 1916, and the act of March 21, 1918, as a whole, and the intention of Congress ascertained from a consideration of all of the legislation upon the subject.

In *Saronville Mills vs. Russell,* 116 U. S., 13, the court in construing the acts of Congress relating to the revenue tariff system said (p. 21):

> "The whole system must be regarded in each alteration, and no disturbance allowed of existing legisla-

tive rules of general application beyond the clear intention of Congress."

Turning to section 10 of the act of March 21, 1918, we find the rule stated:

> "Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President."

Congress here expressly states its intent that the carriers shall be subject to the provisions of existing law except (1) where such laws are inconsistent with the provisions of this act or any other act applicable to Federal control, and (2) except where such laws are inconsistent with any order of the President. Thus we find the rule written into the statute itself.

Since the act of March 21, 1918, is the only act in which such inconsistency can be asserted to exist, let us examine the provisions of that act to ascertain whether there is contained therein provisions inconsistent with the laws of the State relating to the promulgation and establishment of intrastate rates.

In section 10 we find the following:

> "During the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination."

Is the power here vested in the President to "initiate" rates inconsistent with the laws of the State relating to the

filing and establishment of rates? Surely it is not. The used of the word "initiate" in defining the power of a public agency is new, but manifestly it is used in the sense of proposing a rate rather than in the sense of *fixing* or *establishing* the rate. The explanation of the use of this word is probably found in the fact that under the act of August 9, 1917 (Fed. Stat. Ann. Supp., 1918, p. 392: —— Stat. L. ——), the carriers were required to first obtain the approval of the Interstate Commerce Commission before filing any increased rate or charge, and to the desire to remove this restriction during the period of Federal control. Prior to this statute the carriers themselves, under Federal laws and under the laws in force in most of the States, have always had the power to *initiate* rates. This power, however, has never been regarded as inconsistent with the *fixing* and *establishment* of rates by regulative commissions nor with the obligation to comply with provisions of law respecting the filing and publication of the rates so initiated.

Nor is an inconsistency created by the provision for the filing of the rates initiated by the President with the Interstate Commerce Commission. Prior to Federal control rates initiated by the carriers were required to be filed with the State commissions and the Interstate Commerce Commission, and, as pointed out, since the initiation of the rate is not the fixing of that rate, there is no inconsistency in permitting a rate to be initiated by filing it with the Interstate Commerce Commission and the concurrent requirement of compliance with State laws upon the subject. We believe this is the more apparent when regard is had to the provision forbidding the Interstate Commerce Commission from suspending rates initiated by the President pending final determination. In this provision Congress recognized the existence in the commission of a power to suspend rates initiated by the President and evidently felt it necessary to deprive the commission of that power during the period of Federal control, showing that Congress did not regard the power to initiate rates by filing the same with the Interstate Commerce Com-

mission as inconsistent with the power of the commission to review, regulate, and fix the rates so initiated.

As to the rates initiated by the President, the act provides (Sec. 10):

> "Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition."

Having deprived the Interstate Commerce Commission of power to suspend rates initiated by the President and having regard to the changed conditions existing under Federal control, Congress again evidences its intention not to deprive the commission of the powers vested in it by law. This is the more evident from the provision following:

> "After full hearing the commission may make such findings and orders *as are authorized by the act to regulate commerce as amended* (Italics ours) and said findings and orders shall be enforced as provided in said act."

For a statement of the powers of the Interstate Commerce Commission under the Act to Regulate Commerce as amended, we refer the court to the language of Judge Hughes in the *Minnesota Rate Cases*, 230 U. S., 352-417:

> "When Congress, in the year 1887, enacted the Act to Regulate Commerce (24 Stat. at L. 379, Chap.

104, U. S. Comp. Stat Supp., 1911, p. 1284), it was acquainted with the course of the development of railroad transportation and with the exercise by the States of the rate-making power. An elaborate report had been made to the Senate by a committee authorized to investigate the subject of railroad regulation, in which the nature and extent of State legislation, including the commission plan, were fuly reviewed (Senate Report 46, submitted January 6, 1886, 49th Congress, 1st Session). And it was the fact that beyond the bounds of State control there lay a vast field of unregulated activity in the conduct of interstate transportation which was found to be the chief cause of the demand for Federal action.

"Congress carefully defined the scope of its regulation, and expressly provided that it was not to extend to purely intrastate traffic. In the 1st section of the Act to Regulate Commerce there was inserted the following proviso:

" 'Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country, from or to any State or territory as aforesaid.'

"When in the year 1906 (act of June 29, 1906, ch. 3591; 34 Stat. at L., 584, U. S. Comp, Stat. Supp., 1911, p. 1288), Congress amended the act so as to confer upon the Federal commission power to prescribe maximum interstate rates, the proviso in section 1 was re-enacted. Again, in 1910, when the act was extended to embrace telegraph, telephone, and cable companies engaged in interstate business, the proviso was once more re-enacted, with an additional clause so as to exclude intrastate messages from the operation of the statute. (Act of June 18, 1910, Chap. 309, 36 Stat. at L., 545; U. S. Comp Stat. Supp., 1911, p. 1285.) The proviso in its present form reads:

" 'Provided, however, that the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State, and not shipped to or from a foreign country, from or to

any State or territory as aforesaid, nor shall they apply to the transmission of messages by telephone, telegraph, or cable wholly within one State, and not transmitted to or from a foreign country, from or to any State or territory, as aforesaid.'

"*There was thus excluded from the provisions of the act that transportation which was 'wholly within one State,' with the specified qualification where its subject was going to or coming from a foreign country.*"

The provisions of section 10 of the Federal Control Act modify to some extent the powers of the Interstate Commerce Commission in respect to the rules established for its guidance in the determination of questions affecting rates. It must proceed with due consideration to the fact that the railroads are being operated "under a unified and co-ordinated national control and not in competition."

The absence of an express provision in section 10 saving in power of the States to act through the State commissions in cases involving intrastate rates is explained by the provision of section 15 saving the "police power" of the States. Having preserved to the States their right to make police regulations (with certain exceptions), it was wholly unnecessary to expressly save the jurisdiction of the State authorities as was done in the case of the Interstate Commerce Commission.

Another requirement is made by a proviso embodied in section 10, to the effect "That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the

President, together with such recommendations as he may make."

This provision would support a theory that Congress had in mind the idea of the use of the railroads as a vehicle of taxation for the support of the war, and that regarded as such an instrument, the power of the President in the initiation of rates was unlimited. In view, however, of the provision of the section making "justness and reasonableness" the basis of the commission's action, we do not believe the taxation theory can be maintained.

Certainly those provisions of the Federal Control Act with relation to the exercise by the Interstate Commerce Commission of the powers *now possessed* by that body, although modified by the existence of Federal control, cannot be held to be inconsistent to the point of conflict with the existence of State laws regulating the publication and fixing of "reasonable rates for its exclusively internal traffic." (*Minnesota Rate Cases, supra*).

The provisions of the Federal Control Act, in so far as they affect the Interstate Commerce Commission, are purely restrictions or limitations upon the power of that tribunal. These provisions evidence no intent upon the part of Congress to broaden the powers of the commission or to extend its authority over intrastate rates.

It may be contended that by reason of the provision of the act for the taking over of all the revenues of the carriers under Federal control Congress intended to assume authority to fix all rates, interstate and intrastate.

It should be remembered that under the decisions of the Supreme Court of the United States a carrier is entitled to receive reasonable rates and that this right cannot be denied by a State, either through a commission or otherwise.

> "The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it."
>
> *Smyth vs. Ames,* 169 U. S., 466-546.

And as said in the case of *C. M. & St. P. Co. vs. Minnesota*, 134 U. S. 418-548, this is a question for the courts:

> "The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United Sates; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

As said by the Supreme Court of South Dakota in the case of *State ex rel. Attorney General vs. Dakota Central Telephone Company*, decided March 24, 1919:

> "Intrastate rates, as well as interstate rates, established under authority of the law, are entitled to the benefit of a presumption that they are fair and reasonable. How can it be said to be inconsistent with the assumption of the revenues for Congress to declare that such assumption was subject to the reaonable rates lawfully established."

It will undoubtedly be argued that the Government, as the temporary proprietor of the property, has the right to *initiate and establish* rates. No one disputes the power of the Government to initiate rates. Indeed, the law specifically provides the method of procedure with respect to interstate rates. The question is as to the power in the matter of purely intrastate rates. The Government claims that the war emergency justified the exercise of the supreme power

of the Federal Government. Assume that it did. This is no reason why the law should not have said so.

It was argued by counsel for the railroad administration in the State court that it would be "absurd and contrary to the general welfare" to permit the Government to establish interstate rates for general commodities between points in different States and deny the right to fix the rates on the same commodities between points wholly within a State. Many will agree that the accident of State lines should have no controlling effect, but this condition is no more absurd in time of war than in time of peace, and it is just the condition that obtains in time of peace under the respective jurisdictions of the Interstate Commerce Commission and the authorized State commissions.

(c) THE POLICE REGULATIONS OF THE SEVERAL STATES.

The intent of Congress not to interfere with the right of the States to establish reasonable intrastate rates is further evidenced by section 15 of the act, which is as follows:

> "Nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks or bonds."

As early as the case of *Chicago & N. W. R. vs. Fuller*, 17 Wall., 560, it was held that railroad regulatory legislation was an exercise of the police power. In that case this court had before it an act of the legislature of Iowa, requiring railroad companies to fix their rates for the transportation of freight and passengers and publish those rates and cause a printed copy of them to be posted in all stations and depots, the copy to remain posted during the year. The court said:

> "It is not, in the sense of the Constitution, in anywise a regulation of commerce. *It is a police regula-*

tion, and as such forms a portion of the immense mass of legislation which embraces everything within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves."

In the case of *Munn vs. Illinois*, 94 U. S., 113, it was likewise held that a rate-regulatory statute was an exercise of the police power. This decision has since been adhered to.

The latest expression of the court is found in *Union Dry Goods Co. vs. Georgia Public Service Corporation*, decided March 24, 1919, as follows:

> "The presumption of law is in favor of the validity of the order, and the plaintiff in error did not deny, as it could not successfully, that capital invested in an electric light and power plant to supply electricity to the inhabitants of the city is devoted to a use in which the public has an interest which *justifies rate regulation by a State in the exercise of its police power.* (Italics ours.) *Munn vs. Illinois*, 94 U. S., 113; *Budd vs. New York*, 143 U. S., 517; *German Alliance Insurance Co. vs. Lewis, superintendent of the State of Kansas*, 233 U. S., 289, 407."

Similar expressions are found in many of the decisions of State courts. To illustrate:

> "That act (public service act) is an elaborate law bottomed on the police power."
>
> *State vs. Kansas City Gas Co.* (Mo.), 116 S. W., 854.

> "First, it is made clear by these cases that the ascertaining and establishing reasonable rates for public service is one falling within the police power of the State."
>
> *State ex rel. Sedalia vs. Public Service Commission*, 204 S. W., 497.

> "It (reciprocal demurrage law) was passed under the police power of the State, and in the exercise of

> the sovereign power of the State to regulate public utilities."
>
> *Grand Rapids, etc., Ry. vs. Cobbs,* 168 N. W., 966.

> "The business of the companies (public moving vans) being a class of business subject to police regulation, a clear abuse of such power must be shown in order to warrant the courts in setting aside and declaring void the legislative act."
>
> *Lawson vs. Connelly,* 141 N. W., 623.

> "The power to regulate and control the rates of common carriers has been held to be a legitimate exercise of the police power of the State."
>
> *State vs. Superior Court,* 67 Wash., 37.

It would seem unnecessary, however, to examine the multitudinous definitions of the expressions "police powers" or "police regulations." We think the intent of Congress is apparent from the language of the proviso itself. The fact that Congress deemed it necessary to except police regulations affecting "the issue of stocks and bonds" shows that Congress deemed such laws to be police regulations. This is not consistent with the use of the term in its narrower sense. Evidently Congress had in mind the so-called Blue Sky Laws in force in various States, and felt it necessary that the carriers and the Government should be exempt from such laws during the emergency. Such a law was before this court in *U. P. R. Co. vs. Public Service Com.,* U. S. Adv. Ops. 1918-19, p. 55. Laws of this character, however, are not included within the narrower definitions of police powers or police regulations.

It is true that in its narrower sense police power is sometimes regarded as including measures for the protection of the public morals, and that one of the purposes of Blue Sky legislation is to prevent fraud. The paramount purpose of such laws, however, is to insure business prosperity and promote the economic welfare of the State.

The construction of a similar proviso was before the Supreme Court of South Dakota in the case of *State vs. Dakota Central Telephone Co.*, decided March 24, 1919, involving Federal control of telephone systems. The court discussed the effect of the proviso, saying:

> "It cannot be doubted that the power of a State to regulate the issuance of stocks and bonds by corporations created under its authority is a power entirely foreign to and outside of those powers included in the term 'police power' when such term is used in its narrow sense as referring to the power to preserve public safety, health and morals. Therefore, when Congress declared that the 'police regulations of the several States' left to the States, should not 'affect the issue of stocks and bonds' of telegraph and telephone companies, it is clear that it had in mind reserving to the States 'police regulations' which, if unrestricted, might affect the issue of stocks and bonds. Thus Congress has, by the very wording of this proviso, declared that it reserved to the States, subject to two limitations, the full police powers that the States possess as sovereign States. The term 'lawful police regulations' is therefore self-interpreted by Congress and needs no interpretation by the courts."

This language is directly applicable to the fifteenth section of the Federal Control Act and completely answers the contention that Congress used the term "police regulations" in its narrower sense, as not including rate-control regulations.

(*d*) STATE REGULATION OF LOCAL RATES DOES NOT "AFFECT THE TRANSPORTATION OF TROOPS, WAR MATERIALS (OR) GOVERNMENT SUPPLIES."

We have shown that the Federal Control Act is not inconsistent with, and therefore does not supersede, the police regulations of the States. We have shown that State regulatory laws are police regulations.

The question then arises: Do State regulations affecting only the transportation of property between private individuals and entirely within the limits of a State "affect the transportation of troops, war materials, or Government supplies?"

Section 10 provides "that carriers while under Federal control shall be subject to all laws and liabilities as common carriers * * * except in so far as they may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President." This exception is explicitly interpreted by section 15.

The word "affect" has a very elastic meaning in ordinary usage, but according to all legal interpretations of the word in statutory form it is held to mean to act injuriously upon or to affect adversely to a substantial degree. In the case of *Bryan vs. Carter,* 93 U. S., 78; 23 L. Ed., 807, the court had under consideration the meaning of the word "affect" as used in the proviso to an act of Congress confirming the title to certain real estate in the Territory of Missouri. The proviso was as follows:

> *"Provided,* That nothing herein contained shall be construed to *affect* the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in said territory."

In the opinion the court said:

> "It is unnecessary to give the various definitions of the word 'affect.' It is enough to say that it is often used in the sense of acting injuriously upon persons or things; and in this sense we are all of opinion it was used in this proviso. This interpretation accords with the reason and manifest intent of the proviso."

The matter of the charges for carrying passengers and freight between the various stations situated along the lines

of the Northern Pacific in the State of North Dakota has no direct effect upon the transportation of troops, war materials, or Government supplies. As stated before, it must be presumed that the established rates are reasonable. Such rates, governing as they do the transportation of property between individuals, have no more effect upon the conduct of the war than does any other purely local police regulation.

(*e*) POWER OF THE PRESIDENT.

We have sought to show that the provisions of the Federal Control Act are not inconsistent with the laws of the State relating to the establishment of intrastate rates. It may be argued, however, that notwithstanding that no such inconsistency in the specific provisions of law exists, nevertheless, under the provisions of section 10 the carriers are subject to existing laws and liability only to the extent that such laws and liabilities are not inconsistent "with any order of the President," and that therefore the President may by order suspend the provisions of State regulatory laws. Certainly this position is not tenable when the nature of the power conferred upon the President is considered. The President is not given arbitrary power under the Federal Control Act.

By the act of August 29, 1916, the President was authorized to take possession and assume control of the carriers and utilize the same "to the exclusion as far as may be necessary of all other traffic thereon for the transfer or transportation of troops, war material, and equipment or for such other purposes connected with the emergency as may be needful or desirable."

The act of March 21, 1918, regards the taking over of the railroads as an accomplished fact under the prior act.

The President has not been vested with authority to set aside State laws, whenever he thinks it necessary to do so, for purposes connected with the war or for purposes connected only with the ordinary administration of railroad

affairs. The act subordinates State laws to such orders as the President is validly authorized to make by the act of March 21, 1918, and the act of August 29, 1916. Any order not so authorized would be of no effect. This is the interpretation stated on the floors of Congress by the member in charge of the bill (56 Cong. Rec., p. 3497):

> "MR. NORTON. * * * Does the gentleman have in mind any particular provision of a Federal law or any particular provision of any State law affecting railroads that could not be set aside by an order of the President under section 10 of this act? If the gentleman has any such State or Federal law in mind, will he state what it is?
>
> "MR. SIMS. I have all such laws in mind, and it is plainly provided that the carriers under Federal control shall be subject to all laws, whether Federal or State.
>
> "MR. NORTON. Will the gentleman answer my question as to what Federal law or what State law could not be set aside?
>
> "MR. SIMS. I am trying to answer the gentleman the best I can. I may not do it, but I am trying to do it. This reads: except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President.
>
> "That means inconsistent with the provisions of this act or any order of the President made in pursuance of such acts or this act. *Now, I can not conceive that the President would ever for one moment suppose that he could make an order to overturn a law of a State that was not inconsistent, unless it was a law that would cripple and make it impossible to operate a railroad under Federal control.*"

In the case of Muir *vs.* Louisville & N. R. Co., 247 Fed., 888, in discussing the effect of the President's proclamation of December 26, 1917, the court said:

> "But such papers cannot have any effect as laws in the absence of express constitutional or congressional authorization."

Under the act of March 21, 1918, the President is authorized to make only such orders as are necessary or proper to carry out the objects of Federal control, *i. e.*, the use of the railroads for war and other purposes connected therewith.

No one would contend, for instance, that the President may make orders with respect to the method of recording documents affecting the title to the property of the carriers, the matter of establishing liens against their property, the liability of the carriers for damages in cases of personal injury or loss or destruction of property.

Clearly the State laws upon these subjects are not inconsistent with the act of Congress and cannot be abrogated or superseded by an order of the President. The laws governing the carriers in these matters have no relation to the conduct of the war. Similarly, if the obligation of the carriers to transport property at reasonable rates established by State law is not inconsistent with the provisions of the acts of Congress, it is not within the power of the President to interfere with the force and effect of these laws.

(*f*) THE HISTORY OF THE ACT IN CONGRESS.

While the debates in Congress may not be resorted to for the purpose of ascertaining the intention of that body as expressed by the different members upon the floor, yet the congressional history of an act is often a most valuable source of ascertaining the legislative intent. As said by this court in Standard Oil Company *vs.* U. S., 221 U. S., 1 (page 50):

> "The debates show that doubt as to whether there was a common law of the United States which governed the subject in the absence of legislation was among the influences leading to the passage of the act. They conclusively show, however, that the main cause which led to the legislation was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous

> development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the wide-spread impression that their power had been and would be exerted to oppress individuals and injure the public generally. Although debates may not be used as a means for interpreting a statute (United States *vs.* Trans-Missouri Freight Association, 166 U. S., 318, and the cases cited), that rule in the nature of things is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law, that is, the history of the period when it was adopted."

We believe that when the Federal Control Act is viewed in the light of the changes made in its text during the time it was under consideration by Congress, prior to its final passage, there can be but one opinion upon the question of the purpose of that body, that the States should retain their power to regulate rates applicable to their strictly domestic commerce.

The bill was introduced in the Senate (S. 3752) by Senator Smith of South Carolina, chairman of the committee of interstate commerce and was in charge of that gentleman on the floor of the Senate (56 Cong. Rec., p. 1685). In the House the bill was introduced (*Id.*, p. 1857) by Mr. Sims (H. R. 9685). The bill was an administration measure (*Id.*, p. 1944).

Unfortunately, the original bill is not set forth in full in the Congressional Record, so that its import must be gathered from statements upon the floor. It clearly appears, however, that as originally introduced, the bill vested final authority in the matter of establishing rates in the President (*Id.*, 2337):

> "Mr. SIMS. But when the public interest so requires the President may initiate rates, filing them with the Interstate Commerce Commission, to take effect upon such notice as he shall direct. Such rates

> are to be 'fair, reasonable and just.' But to guard against even remote possibilities of error the section provides that upon complaint the Interstate Commerce Commission shall make investigation, grant full hearings concerning the 'fairness, justness and reasonableness' of rates so ordered by the President, and 'make report of its findings and recommendations' to the President for such action as he shall deem required in the public interest."

Section 15 was not in the original bill and Section 10 was not in its present form. After consideration of the bill, the Senate Committee on Interstate Commerce presented a report accompanied by a bill prepared by the committee. (*Id.*, p. 1939).

Section 10 of the committee bill was as follows (*Id.*, p. 1940):

> "That carriers while under Federal control shall, in so far as is not inconsistent therewith, or with the provisions of this act, or any other act applicable to such Federal control, or with any order of the President, be subject to all laws and liabilities as common carriers, whether arising under statutes or at common law; and suits may be brought by and against such carriers and judgments rendered as now provided by law. But no process, mesne or final, shall be levied against any property under such Federal control.
>
> "That whenever in his opinion the public interest requires the President may initiate rates by filing the same with the Interstate Commerce Commission. Said rates shall be fair, reasonable, and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, or classification of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the rate. After full hearing the commission may make such findings and orders as are authorized by the Act to Regulate Commerce as amended."

A comparison of this section with the corresponding section of the act as finally adopted will show a number of changes, evidently made with the view of preserving the laws of the States.

It is not practicable, nor would it serve any useful purpose, to follow the act through the different steps leading to its final passage. Various amendments were proposed designed to effect one change or another; some of them to broaden the President's authority, others to more clearly preserve the power of the States. An attempt to set forth the substance of the debates would necessitate so much explanatory matter as to render the question more difficult of understanding than the records of the debates themselves. Moreover, the opinions of the individual members are of little importance in the determination of the question of law. For the convenience of the court, we include an index to the Congressional Record in Appendix III.

The bill first passed the Senate (*Id.*, p. 2519). However, as passed by that body, section 10 with the amendments mentioned was in almost the same form as when reported by the Committee on Interstate Commerce. The bill did not contain section 15 or any analogous provision. Section 13, however, saved State laws concerning taxation.

Contemporaneously with the Senate, the House had proceeded with the consideration of the House bill (H.R. 9685). As in the Senate, various amendments were offered.

Finally, the House took up the Senate bill, struck all the provisions following the enacting clause, substituted the provisions of the House bill, and passed it (*Id.*, p. 2835).

The Senate, failing to agree, a conference committee was appointed, and, the first report of this committee failing of adoption on a point of order, the bill was further considered in conference with the result that the report was agreed to and the bill passed both the House and the Senate. It was during these conferences that section 15 was inserted. In

its present form, that section was recommended by the final conference.

Thus, from a bill in which it was attempted to lodge final rate-making powers in the President, the bill became one in which the "police regulations" of the States and the jurisdiction of the Interstate Commerce Commission were preserved.

When a proposed act as introduced in the legislature establishes one rule (*i. e.*, broadly empowers the President to fix rates) and during its progress through that body is changed so that, giving the words used their ordinary definite meaning, the act means something else (*i. e.*, intrastate rates to be fixed by local authorities), that fact is of the greatest importance in determining the intention of the legislature. The act should be examined in the light of the change; and we submit that when this is done, the conclusion is unavoidable that Congress intended, as it said, that nothing in the act should be construed "to repeal, impair, or affect * * * the lawful police regulations of the several States * * * "

Respectfully submitted,

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APPENDIX I.

ACTS OF CONGRESS AND PROCLAMATION OF THE PRESIDENT.

Extract from Act of August 29, 1916 (39 Stat., 645):

The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable. * * *

II.

PROCLAMATION OF DECEMBER 26, 1917.

By the President of the United States of America:

A PROCLAMATION.

Whereas the Congress of the United States, in the exercise of the constitutional authority vested in them, by Joint Resolution of the Senate and House of Representatives bearing date April 6, 1917, resolved:

That the state of war between the United States and the Imperial German Government which has thus been thrust upon the United States is hereby formally declared; and that the President be, and he is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial German Government; and to bring the conflict to a successful termination all of the resources of the country are hereby pledged by the Congress of the United States.

And by resolution bearing date of December 7, 1917, resolved:

That a state of war is hereby declared to exist between the United States of America and the Imperial and Royal Austro-Hungarian Government; and that the President be,

and he is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial and Royal Austro-Hungarian Government; and to bring the conflict to a successful termination all the resources of the country are hereby pledged by the Congress of the United States.

And whereas it is provided by section I of the act approved August 29, 1916, entitled "An act making appropriations for the support of the army for the fiscal year ending June 30, 1917, and for other purposes," as follows:

The President in time of war is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, as far as may be necessary, of all other traffic thereon for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

And whereas it has now become necessary in the national defense to take possession and assume control of certain systems of transportation and to utilize the same, to the exclusion, as far as may be necessary, of other than war traffic thereon, for the transportation of troops, war material, and equipment therefor, and for other needful and desirable purposes connected with the prosecution of the war;

Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto enabling me, do hereby, through Newton D. Baker, Secretary of War, take possession and assume control at 12 o'clock noon on the 28th day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies, and terminal associations, sleeping and parlor cars, private cars, and private car lines, elevators, warehouses, telegraph and telephone lines, and all other equipment and appurtenances

commonly used upon or operated as a part of such rail or combined rail-and-water systems of transportation; to the end that such systems of transportation be utilized for the transfer and transportation of troops, war material, and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers.

It is hereby directed that the possession, control, operation, and utilization of such transportation systems, hereby by me undertaken, shall be exercised by and through William G. McAdoo, who is hereby appointed and designated Director General of Railroads. Said Director may perform the duties imposed upon him, so long and to such extent as he shall determine, through the boards of directors, receivers, officers, and employees of said systems of transportation. Until and except so far as said director shall from time to time by general or special orders otherwise provide, the boards of directors, receivers, officers, and employees of the various transportation systems shall continue the operation thereof in the usual and ordinary course of the business of common carriers, in the names of their respective companies.

Until and except so far as said director shall from time to time otherwise by general or special orders determine, such systems of transportation shall remain subject to all existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof may be situated. But any orders, general or special, hereafter made by said director shall have paramount authority and be obeyed as such.

Nothing herein shall be construed as now affecting the possession, operation, and control of street electric passenger railways, including railways commonly called interurbans, whether such railways be or be not owned or controlled by such railroad companies or systems. By subsequent order and proclamation, if and when it shall be found necessary or desirable, possession, control, or operation may be taken of all or any part of such street railway systems, including subways and tunnels; and by subsequent order and proclamation possession, control, and operation in whole or in part may also be relinquished to the owners thereof of any part

of the railroad systems or rail and water systems, possession and control of which are hereby assumed.

The director shall, as soon as may be after having assumed such possession and control, enter upon negotiations with the several companies looking to agreements for just and reasonable compensation for the possession, use, and control of their respective properties on the basis of an annual guaranteed compensation above accruing depreciation and the maintenance of their properties equivalent, as nearly as may be, to the average of the net operating income thereof for the three-year period ending June 30, 1917, the results of such negotiations to be reported to me for such action as may be appropriate and lawful.

But nothing herein contained, expressed or implied, or hereafter done or suffered hereunder, shall be deemed in any way to impair the rights of the stockholders, bondholders, creditors, and other persons having interests in said systems of transportation or in the profits thereof to receive just and adequate compensation for the use and control and operation of their property hereby assumed.

Regular dividends hitherto declared and maturing interest upon bonds, debentures, and other obligations may be paid in due course; and such regular dividends and interest may continue to be paid until and unless the said director shall from time to time otherwise by general or special orders determine; and, subject to the approval of the director, the various carriers may agree upon and arrange for the renewal and extension of maturing obligations.

Except with the prior written assent of said director, no attachment by mesne process or on execution shall be levied on or against any of the property used by any of said transportation systems in the conduct of their business as common carriers; but suits may be brought by and against said carriers and judgments rendered as hitherto until and except so far as said director may, by general or special orders, otherwise determine.

From and after 12 o'clock on said 28th day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice. But for the purpose of accounting said possession and control shall date from 12 o'clock midnight on December 31, 1917.

In witness whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done by the President, through Newton D. Baker, Secretary of War, in the District of Columbia, this 26th day of December, in the year of our Lord one thousand nine hundred and seventeen, and of the independence of the United States the one hundred and forty-second.

WOODROW WILSON.

By the President:

ROBERT LANSING,
Secretary of State.

NEWTON D. BAKER,
Secretary of War.

III.

Act of March 21, 1918.

An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the

computation of such income, debits, and credits arising from the accounts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the act of October third, nineteen hundred and seventeen, or acts in addition thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to invest-

ment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this act or of the act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of non-operation, receivership, or where

recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this act; *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban, passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this act and any regulation or order made by or through the President under authority of this act or of that portion of the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

SEC. 2. That if no such agreement is made, or pending the execution of an agreement, the President may nevertheless pay to any carrier while under Federal control an annual amount, payable in reasonable installments, not exceeding ninety per centum of the estimated annual amount of just compensation, remitting such carrier, in case where no agreement is made, to its legal rights for any balance claimed to the remedies provided in section three hereof. Any amount thereafter found due such carrier above the amount paid shall bear interest at the rate of six per centum per annum. The

acceptance of any benefits under this section shall constitute an acceptance by the carrier of all the provisions of this act and shall obligate the carrier to pay to the United States, with interest at the rate of six per centum per annum from a date or dates fixed in proceedings under section three, the amount by which the sums received under this section exceed the sum found due in such proceedings.

SEC. 3. That all claims for just compensation not adjusted (as provided in section one) shall, on the application of the President or of any carrier, be submitted to boards, each consisting of three referees to be appointed by the Interstate Commerce Commission, members of which and the official force thereof being eligible for service on such boards without additional compensation. Such boards of referees are hereby authorized to summon witnesses, require the production of records, books, correspondence, documents, memoranda, and other papers, view properties, administer oaths, and may hold hearings in Washington and elsewhere, as their duties and the convenience of the parties may require. In case of disobedience to a subpœna the board may invoke the aid of any district court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence, and such court within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpœna issued to any person, corporation, partnership, or association, issue an order requiring appearance before the board, or the production of documentary evidence if so ordered, or the giving of evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. Such cases may be heard separately or together or by classes, by such boards as the Interstate Commerce Commission in the first instance, or any board of referees to which any such cases shall be referred may determine. Said boards shall give full hearings to such carriers and to the United States; shall consider all the facts and circumstances, and shall report as soon as practicable in each case to the President the just compensation, calculated on an annual basis and otherwise in such form as to be convenient and available for the making of such agreement as is authorized in section one. The President is authorized to enter into an agreement with such carrier for just compensation upon a basis not in excess of that reported by such board,

and may include therein provisions similar to those authorized under section one. Failing such agreement, either the United States or such carrier may file a petition in the Court of Claims for the purpose of determining the amount of such just compensation, and in the proceedings in said court the report of said referees shall be *prima facie* evidence of the amount of just compensation and of the facts therein stated. Proceedings in the Court of Claims under this section shall be given precedence and expedited in every practicable way.

SEC. 4. That the just compensation that may be determined as hereinbefore provided by agreement or that may be adjudicated by the Court of Claims, shall be increased by an amount reckoned at a reasonable rate per centum to be fixed by the President upon the cost of any additions and betterments, less retirements, and upon the cost of road extensions to the property of such carrier made by such carrier with the approval of or by order of the President while such property is under Federal control.

SEC. 5. That no carrier while under Federal control shall, without the prior approval of the President, declare or pay any dividend in excess of its regular rate of dividends during the three years ended June thirtieth, nineteen hundred and seventeen. *Provided, however,* That such carriers as have paid no regular dividends or no dividends during said period may, with the prior approval of the President, pay dividends at such rate as the President may determine.

SEC. 6. That the sum of $500,000,000 is hereby appropriated out of any moneys in the Treasury not otherwise appropriated, which, together with any funds available from any operating income of said carriers, may be used by the President as a revolving fund for the purpose of paying the expenses of the Federal control, and so far as necessary the amount of just compensation, and to provide terminals, motive power, cars, and other necessary equipment, such terminals, motive power, cars, and equipment to be used and accounted for as the President may direct and to be disposed of as Congress may hereafter by law provide.

The President may also make or order any carrier to make any additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other equipment necessary or desirable for war purposes or in the public interest on or in connection with the property of any carrier. He may from said revolving fund advance to such carrier

all or any part of the expense of such additions, betterments, or road extensions, and to provide terminals, motive power, cars, and other necessary equipment so ordered and constructed by such carrier or by the President, such advances to be charged against such carrier and to bear interest at such rate and be payable on such terms as may be determined by the President, to the end that the United States may be fully reimbursed for any sums so advanced.

Any loss claimed by any carrier by reason of any such additions, betterments, or road extensions, so ordered and constructed may be determined by agreement between the President and such carrier; failing such agreement the amount of such loss shall be ascertained as provided in section three hereof.

From said revolving fund the President may expend such an amount as he may deem necessary or desirable for the utilization and operation of canals, or for the purchase, construction, or utilization and operation of boats, barges, tugs, and other transportation facilities on the inland, canal, and coastwise waterways, and may in the operation and use of such facilities create or employ such agencies and enter into such contracts and agreements as he shall deem in the public interest.

SEC. 7. That for the purpose of providing funds requisite for maturing obligations or for other legal and proper expenditures, or for reorganizing railroads in receivership, carriers may, during the period of Federal control, issue such bonds, notes, equipment trust certificates, stock, and other forms of securities, secured or unsecured by mortgage, as the President may first approve as consistent with the public interest. The President may, out of the revolving fund created by this act, purchase for the United States all or any part of such securities at prices not exceeding par, and may sell such securities whenever in his judgment it is desirable at prices not less than the cost thereof. Any securities so purchased shall be held by the Secretary of the Treasury, who shall, under the direction of the President, represent the United States in all matters in connection therewith in the same manner as a private holder thereof. The President shall each year as soon as practicable after January first, cause a detailed report to be submitted to the Congress of all receipts and expenditures made under this section and section six during the preceding calendar year.

SEC. 8. That the President may execute any of the powers herein and heretofore granted him with relation to Federal control through such agencies as he may determine, and may fix the reasonable compensation for the performance of services in connection therewith, and may avail himself of the advice, assistance, and co-operation of the Interstate Commerce Commission and of the members and employees thereof, and may also call upon any department, commission, or board of the Government for such services as he may deem expedient. But no such official or employee of the United States shall receive any additional compensation for such services except as now permitted by law.

SEC. 9. That the provisions of the act entitled "An act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, shall remain in force and effect except as expressly modified and restricted by this act; and the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofore conferred. The provisions of this act shall also apply to any carriers to which Federal control may be hereafter extended.

SEC. 10. That carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal court any action heretofore or hereafter instituted by or against it, which action was not so transferable prior to the Federal control of such carrier; and any action which has heretofore been so transferred because of such Federal control or of any act of Congress or official order or proclamation relating thereto shall upon motion of either party be transferred to the court in which it was origi-

nally instituted. But no process, mesne or final, shall be levied against any property under such Federal control.

That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

Such rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and co-ordinated national control and not in competition.

After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: *Provided, however,* That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make.

SEC. 11. That every person or corporation, whether carrier or shipper, or any receiver, trustee, lessee, agent or per-

son acting for or employed by a carrier or shipper, or other person, who shall knowingly violate or fail to observe any of the provisions of this act, or shall knowingly interfere with or impede the possession, use, operation, or control of any railroad property, railroad, or transportation system hitherto or hereafter taken over by the President, or shall knowingly violate any of the provisions of any order or regulation made in pursuance of this act, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by a fine of not more than $5,000, or, if a person, by imprisonment for not more than two years, or both. Each independent transaction constituting a violation of, or a failure to observe, any of the provisions of this act, or any order entered in pursuance hereof, shall constitute a separate offense. For the taking or conversion to his own use or the embezzlement of money or property derived from or used in connection with the possession, use, or operation of said railroads or transportation systems, the criminal statutes of the United States, as well as the criminal statutes of the various States where applicable, shall apply to all officers, agents and employees engaged in said railroad and transportation service, while the same is under Federal control, to the same extent as to persons employed in the regular service of the United States. Prosecutions for violations of this act or of any order entered hereunder shall be in the district courts of the United States, under the direction of the Attorney General, in accordance with the procedure for the collection and imposing of fines and penalties now existing in said courts.

SEC. 12. That moneys and other property derived from the operation of the carriers during Federal control are hereby declared to be the property of the United States. Unless otherwise directed by the President, such moneys shall not be covered into the Treasury, but such moneys and property shall remain in the custody of the same officers, and the accounting thereof shall be in the same manner and form as before Federal control. Disbursements therefrom shall, without further appropriation, be made in the same manner as before Federal control and for such purposes as under the Interstate Commerce Commission classification of accounts in force on December twenty-seventh, nineteen hundred and seventeen, are chargeable to operating expenses or to railway tax accruals and for such other purposes in connection with Federal control as the President may direct,

except that taxes under titles one and two of the act entitled "An act to provide revenue to defray war expenses, and for other purposes," approved October third, nineteen hundred and seventeen, or any act in addition thereto or in amendment thereof, shall be paid by the carrier out of its own funds. If Federal control begins or ends during the tax year for which any taxes so chargeable to railway tax accruals are assessed, the taxes for such year shall be apportioned to the date of the beginning or ending of such Federal control, and disbursements shall be made only for that portion of such taxes as is due for the part of such tax year which falls within the period of Federal control.

At such periods as the President may direct, the books shall be closed and the balance of revenues over disbursements shall be covered into the Treasury of the United States to the credit of the revolving fund created by this act. If such revenues are insufficient to meet such disbursements, the deficit shall be paid out of such revolving fund in such manner as the President may direct.

SEC. 13. That all pending cases in the courts of the United States affecting railroads or other transportation systems brought under the Act to Regulate Commerce, approved February fourth, eighteen hundred and eighty-seven, as amended and supplemented, including the commodities clause, so-called, or under the Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies, approved July second, eighteen hundred and ninety, and amendments thereto, shall proceed to final determination as soon as may be, as if the United States had not assumed control of transportation systems; but in any such case the court having jurisdiction may, upon the application of the United States, stay execution of final judgment or decree until such time as it shall deem proper.

SEC. 14. That the Federal control of railroads and transportation systems herein and heretofore provided for shall continue for and during the period of the war and for a reasonable time thereafter, which shall not exceed one year and nine months next following the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided, however*, That the President may prior to July first, nineteen hundred and eighteen, relinquish control of all or any part of any railroad or system of transportation, further Federal control of which the President

shall deem not needful or desirable; and the President may at any time during the period of Federal control agree with the owners thereof to relinquish all or any part of any railroad or system of transportation. The President may relinquish all railroads and systems of transportation under Federal control at any time he shall deem such action needful or desirable. No right to compensation shall accrue to such owners from and after the date of relinquishment for the property so relinquished.

SEC. 15. That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds.

SEC. 16. That this act is expressly declared to be emergency legislation enacted to meet conditions growing out of war; and nothing herein is to be construed as expressing or prejudicing the future policy of the Federal Government concerning the ownership, control, or regulation of carriers or the method or basis of the capitalization thereof.

Approved March 21, 1918.

APPENDIX II.

CONSTITUTIONAL AND STATUTORY PROVISIONS OF NORTH DAKOTA.

I.

Article 3, Section 82 Const., Comp. Laws, North Dakota, 1913:

There shall be chosen by the qualified electors of the State at the times and place of choosing members of the legislative assembly, a secretary of State, auditor, treasurer, superintendent of public instruction, commissioner of insurance, three commissioners of railroads, an attorney general and one commissioner of agriculture and labor, who shall have attained the age of twenty-five years, shall be citizens of the

United States, and shall have the qualifications of State electors. They shall severally hold their offices at the seat of government, for the term of two years and until their successors are elected and duly qualified, but no person shall be eligible to the office of treasurer for more than two consecutive terms.

II.

Section 4724, Comp. L., N. Dak., 1913:

Every railroad, railroad corporation or common carrier, subject to the provisions of this chapter, shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such railroad, railroad corporation or common carrier has established, and which are in force at the time upon its railroads as defined by this chapter. The schedules printed as aforesaid by any such railroad, railroad corporation or common carrier shall plainly state the places upon its railroads between which property and passengers will be carried and shall contain the classification of freight or express in force upon it, and shall also state separately any terminal charges and any rules or regulations which in any wise change, affect or determine any part of the aggregate of such aforesaid rates, fares and charges. Such schedules shall be plainly printed in large type of at least the size of ordinary pica, and a copy for the use of the public shall be kept in every freight, express, or receiving office or passenger station of such railroad, railroad corporation or common carrier where it can be conveniently inspected, and it shall keep a printed notice posted in every such office and passenger station indicating where therein such schedules can be found.

III.

Sec. 4725, Comp. L. N. Dak., 1913:

No advance shall be made in the rates, fares and charges which have been established and published as aforesaid by any railroad, railroad corporation or common carrier in compliance with the requirements of this article, except after ten days' notice in writing to the commissioners of railroads which shall plainly state the changes proposed to be made in

the schedules then in force and the time when the increased rates, fares or charges will go into effect; and the proposed charges shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reduction in such published rates, fares, or charges may be made without previous notice, but whenever any such reduction is made, notice of the same shall immediately be publicly posted, and the change made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.

IV.

Sec. 4796, Comp. L. N. Dak., 1913:

Every railroad, railroad corporation and common carrier doing business in this State, their officers, agents, representatives, employees, trustees, receivers and lessees shall be limited to a compensation of not to exceed two and one-half cents per mile for distances exceeding six miles, for the transportation of any person with ordinary baggage not exceeding one hundred and fifty pounds in weight; and for children five years of age and less than twelve years of age, one-half of the fare charged for adults; and for children under five years old who are traveling with an adult paying full fare, no charge shall be made; *Provided,* That every railroad, railroad corporation and common carrier doing business in this State shall issue upon request of any person, mileage books in denomination of one thousand miles, limited to not less than one year from date of issue and redeemable within one year after the expiration of such limitation, with baggage and other facilities similar to those accompanying regular trip tickets, at a price of twenty dollars each; that such mileage books shall be good for travel by the purchaser and such adult members of his family as he may designate and whose names are then and there written thereon, but the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance; *Provided, further,* That the provisions of this act shall not apply to the transportation of passengers within the boundaries of any city by street railway companies. Every officer, agent, conductor, representative or any employee of any railroad, railroad corporation or common carrier who

shall aid or abet any such railroad, railroad corporation or common carrier in the violation of this act by selling, charging or collecting for any ticket or transportation over any railroad any greater sum, charge or rate than that above specified shall be deemed personally guilty of a violation of this article and, upon conviction, shall be punished as hereinafter provided. The sum of ten cents may be added to the legal fare when the same is paid in the cars, provided that a reasonable opportunity has been afforded to passengers to purchase tickets at the legal rate of fare before boarding the train.

APPENDIX III.

Debates on Federal Rail Control Bill.

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(Rate-making Power Discussed—Sec. 10)	2337–2360
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(Rate-fixing amendment)
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2686–2721
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Police regulations (Sec. 15), see pages 3305–6.
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NORTHERN PACIFIC RAILWAY COMPANY ET AL. *v.* STATE OF NORTH DAKOTA ON THE RELATION OF LANGER, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 976. Argued May 5, 1919.—Decided June 2, 1919.

Under the "Federal Control Act" of March 21, 1918, c. 25, 40 Stat. 451, railroads taken over and administered under the war power pursuant to the Act of August 29, 1916, c. 418, 39 Stat. 645, and the President's Proclamation of December 26, 1917, are in the full possession and control of the Federal Government, and that Government is granted the power through the President and the Interstate Commerce Commission to fix the rates on intrastate traffic, superseding the state power over that subject. P. 148.

The Federal Control Act being an exercise of a complete, exclusive and necessarily paramount federal power (the war power) and its provision for a complete change to federal control being clear and unambiguous, there can be no room for a presumption that state control over intrastate rates was to remain unchanged because it previously existed. P. 149. *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, distinguished.

Under § 10 of the Federal Control Act, the power of the Interstate Commerce Commission to consider rates, like the power of the President to initiate them, relates to both classes—intrastate and interstate. P. 151.

The declaration of § 15 that nothing in the act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or "the lawful police regulations of the several States," except wherein such laws, powers, or regulations may affect the transportation of troops, etc., or "the issue of stocks and bonds," cannot be interpreted as withholding the power to initiate intrastate rates under § 10. *Id.*

Where the acts of a federal official are sought to be restrained in a state court, as invasions of state power, there is jurisdiction, if the claim be not frivolous, to pass upon their legality, although, if

legal, their restraint would affect directly the interests of the United States, which cannot be impleaded; and where the decision is against their legality, this court, finding it erroneous, has jurisdiction to reverse the resulting judgment upon the merits. P. 152.

172 N. W. Rep. 324, reversed.

THE case is stated in the opinion.

Mr. John Barton Payne and *Mr. Charles Donnelly*, with whom *The Solicitor General* and *Mr. R. V. Fletcher* were on the brief, for the Director General of Railroads, maintained that the war power, limited only by the needs of the Government and independent of state lines, supported the action taken; that the act in letter and spirit shows a purpose to bring about a unified federal control, utterly inconsistent with the retention of state power over intrastate rates; and that the proviso saving "lawful police regulations" (§ 15) must be read accordingly, and subject to the particular provisions of § 10 expressly allowing the President to initiate rates, etc. The words "police regulations" are used here in contrast with "laws and powers" as applied to taxation; they include regulations for safety, health, etc. The railroads became federal agencies, not subject to state police power.

Mr. Charles W. Bunn filed a brief on behalf of the Northern Pacific Railway Co.

Mr. Frank E. Packard, with whom *Mr. William Langer*, Attorney General of the State of North Dakota, and *Mr. W. V. Tanner* were on the brief, for defendant in error:

Railroads built under acts of Congress and aided by government lands and bonds for the purpose of securing the use and benefit of such railroads for postal and military

purposes are subject to the state power to tax, *Thomson* v. *Union Pacific Ry. Co.*, 9 Wall. 579; *Union Pacific Ry. Co.* v. *Peniston*, 18 Wall. 5; and of eminent domain and of regulation. *Union Pacific Ry. Co.* v. *Burlington & Missouri River Ry. Co.*, 3 Fed. Rep. 106, and *Union Pacific Ry. Co.* v. *Leavenworth N. & S. Ry. Co.*, 29 Fed. Rep. 728.

The power to regulate and the power to tax are inherent in sovereignty—the power to tax being the more drastic of the two. Therefore, as the power to tax may be exercised in respect to the agency or instrumentality of the Federal Government, the power to regulate can likewise be exercised by the State. This was the rule laid down in *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, where it was held that, in the absence of an express exemption from state control, it must be assumed that Congress intended the corporation to be subject to the ordinary control exercised by the State. In *Smyth* v. *Ames*, 169 U. S. 466, a statute involving railroad rates was held constitutional as applied to the Union Pacific Railroad, a government agent and instrumentality.

We think it a fair inference from the decided cases, to assume that the rail control acts involve no question of conflict between state and federal powers. The question here is not merely one of the existence of inherent power either in the National Government or in the States, but the purpose manifested by Congress to exert its powers to the exclusion of that of the States. The question of the extent to which the laws of the State have been superseded by the acts of Congress must be determined from the nature of the provisions of each and the extent to which they are in conflict. This court has repeatedly announced the rule that the question of conflict is to be determined by the ordinary rules of statutory construction and that it should not be held that the state legislation has been superseded except in cases of manifest

repugnancy. *Reid* v. *Colorado*, 187 U. S. 137, 148; *Missouri &c. Ry. Co.* v. *Haber*, 169 U. S. 613, 623.

Congress in § 10 of the Act of 1918 expressly states its intent that the carriers shall be subject to the provisions of existing law, except (1) where such laws are inconsistent with the provisions of the act or any other act applicable to federal control, and (2) except where such laws are inconsistent with any order of the President. Thus we find the rule written into the statute itself.

The power vested in the President to initiate rates is not inconsistent with the laws of the State relating to the filing and establishment of rates. The use of the word "initiate" in defining the power of a public agency is new, but manifestly it is used in the sense of proposing a rate rather than in the sense of fixing or establishing the rate. Under federal laws and in most of the States, carriers have had the power to initiate rates. This, however, has never been regarded as inconsistent with the fixing and establishment of rates by commissions nor with the obligation to comply with provisions of law respecting the filing and publication of the rates so initiated. Nor is an inconsistency created by the provision for the filing of the rates initiated by the President with the Interstate Commerce Commission. Prior to federal control rates initiated by the carriers were required to be filed with the state commissions and the Interstate Commerce Commission, and, as pointed out, since the initiation of the rate is not the fixing of that rate, there is no inconsistency in permitting a rate to be initiated by filing it with the Interstate Commerce Commission and the concurrent requirement of compliance with state laws upon the subject.

The absence of an express provision in § 10 saving the power of the States to act through the state commissions in cases involving intrastate rates is explained by the provision of § 15 saving the police power of the States. Having preserved to the States their right to make police

regulations (with certain exceptions), it was wholly unnecessary to expressly save the jurisdiction of the state authorities as was done in the case of the Interstate Commerce Commission.

The provision in § 10 would support a theory that Congress had in mind the idea of the use of the railroads as a vehicle of taxation for the support of the war, and that, regarded as such an instrument, the power of the President in the initiation of rates was unlimited. In view, however, of the provision of the section making "justness and reasonableness" the basis of the Commission's action, we do not believe the taxation theory can be maintained. Certainly those provisions of the Federal Control Act with relation to the exercise by the Interstate Commerce Commission of the powers now possessed by that body, although modified by the existence of federal control, cannot be held to be inconsistent to the point of conflict with the existence of state laws regulating the publication and fixing of "reasonable rates for its exclusively internal traffic." *Minnesota Rate Cases*, 230 U. S. 352. The provisions of the Federal Control Act, in so far as they affect the Interstate Commerce Commission, are purely restrictions or limitations upon the power of that tribunal. These provisions evidence no intent upon the part of Congress to broaden the powers of the Commission or to extend its authority over intrastate rates. It may be contended that by reason of the provision for the taking over of all the revenues of the carriers under federal control Congress intended to assume authority to fix all rates, interstate and intrastate. It should be remembered that a carrier is entitled to receive reasonable rates and that this right cannot be denied by a State, either through a commission or otherwise.

The question is as to the power in the matter of purely intrastate rates. The Government claims that the war emergency justified the exercise of the supreme power of

the Federal Government. Assume that it did. This is no reason why the law should not have said so.

The intent of Congress not to interfere with the right of the States to establish reasonable intrastate rates is evidenced by § 15 of the act.

As early as *Chicago & Northwestern R. R. Co.* v. *Fuller*, 17 Wall. 560, it was held that railroad regulatory legislation was an exercise of the police power. See also *Munn* v. *Illinois*, 94 U. S. 113; *Union Dry Goods Co.* v. *Georgia Public Service Corporation*, 248 U. S. 372, 374, 375.

It would seem unnecessary to examine the multitudinous definitions of the expressions "police powers" or "police regulations." We think the intent of Congress is apparent from the language of the proviso itself. The fact that Congress deemed it necessary to except police regulations affecting "the issue of stocks and bonds" shows that Congress deemed such laws to be police regulations. This is not consistent with the use of the term in its narrower sense. Evidently Congress had in mind the so-called Blue Sky Laws in force in various States, and felt it necessary that the carriers and the Government should be exempt from such laws during the emergency. Such a law was before this court in *Union Pacific R. R. Co.* v. *Public Service Commission*, 248 U. S. 67. Laws of this character, however, are not included within the narrower definitions of police powers or police regulations.

It is true that in its narrower sense police power is sometimes regarded as including measures for the protection of the public morals, and that one of the purposes of Blue Sky legislation is to prevent fraud. The paramount purpose of such laws, however, is to insure business prosperity and promote the economic welfare of the State.

State regulation of local rates does not "affect the transportation of troops, war materials (or) Government supplies."

The President has not been vested with authority to set

aside state laws, whenever he thinks it necessary to do so, for purposes connected with the war or for purposes connected only with the ordinary administration of railroad affairs. The act subordinates state laws to such orders as the President is validly authorized to make by the Act of March 21, 1918, and the Act of August 29, 1916. Any order not so authorized would be of no effect. This is the interpretation stated on the floors of Congress by the member in charge of the bill. 56 Cong. Rec., p. 3497.

The legislative history of the Federal Control Act shows that under the intention of Congress the States were to retain their power to regulate local rates. S. 3752; H. R. 9685; 56 Cong. Rec., pp. 1685, 1857, 1939, 1940, 1944, 2337, 2519, 2835.

When a proposed act as introduced in the legislature establishes one rule (*e. g.*, broadly empowers the President to fix rates), and during its progress through that body is changed so that, giving the words used their ordinary definite meaning, the act means something else (*e. g.*, intrastate rates to be fixed by local authorities), that fact is of the greatest importance in determining the intention of the legislature.

Mr. Charles E. Elmquist, by leave of court, filed a brief as *amicus curiæ* on behalf of thirty-seven States and the National Association of Railway and Utilities Commissioners.

Mr. Chief Justice White delivered the opinion of the court.

In taking over the railroads from private ownership to its control and operation, was the resulting power of the United States to fix the rates to be charged for the transportation services to be by it rendered subordinated to the asserted authority of the several States to regulate the

rates for all local or intrastate business, is the issue raised on this record. It arises from the allowance by the court below of a peremptory writ of mandamus commanding the Director General of the Railroads, appointed by the President, and the officers of the Northern Pacific Railway Company to desist from charging for transportation in intrastate business in North Dakota the rates fixed by the United States for such services. When this command was obeyed, the mandamus ordered that the Director General should thereafter exact for the services stated only lesser rates which were fixed in a schedule on file with the State Utilities Commission prior to the bringing of suit and which rates under the law of North Dakota could not be changed without the approval of the Utilities Commission. In the opinion of the court below it was stated that all the parties admitted that there was no question as to the jurisdiction to consider the controversy and that they all also agreed that no contention was presented as to the power of Congress to enact the law upon which the controversy depended, as the correct interpretation of such law was the only issue to be decided. We consequently put those subjects temporarily out of view. We say temporarily, since, even upon the assumption that issues concerning them necessarily inhere in the cause and cannot be waived by the parties, we could not decide concerning such issues without interpreting the statute, which we proceed to do.

On the 29th of August, 1916 (39 Stat. 645), Congress gave the President power "in time of war . . . to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." War with Germany was declared in April, 1917, and with Austria on December 7th of the same year

(40 Stat. 1; *ib.* 429). On December 26, 1917, the President, referring to the existing state of war and the power with which he had been invested by Congress in August, 1916, proclaimed that:

"Under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, [I] do hereby . . . take possession and assume control at 12 o'clock noon on the twenty-eighth day of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, warehouses, telegraph and telephone lines and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation;—to the end that said systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable, such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers." [40 Stat. 1733.]

By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of

directors, receivers, employees, etc., who were authorized to continue to perform their duties in accordance with their previous authority "until and except so far as said Director shall from time to time by general or special orders otherwise provide." Limited by the same qualification the systems of transportation taken over by the Government were made subject to existing statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various States in which said systems or any part thereof might be located. In addition, however, to the limitation previously stated the proclamation in express terms declared: "But any orders, general or special, hereafter made by said Director, shall have paramount authority and be obeyed as such."

The proclamation imposed the duty upon the Director General to negotiate with the owners of the railroad companies for an agreement as to compensation for the possession, use and control of their respective properties on the basis of an annual guaranteed compensation and with reservations in the interest of creditors, bondholders, etc. The proclamation in concluding declared that "from and after twelve o'clock on said twenty-eighth day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said Director without further act or notice." Carrying out the authority exerted by the proclamation, the railroads passed into the possession, control and operation of the Director General.

On March 21, 1918, dealing with the subject, Congress passed a law entitled "An Act To provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes." [C. 25, 40 Stat. 451.] The opening sentences of the act declared: "That the President, having in time of war taken over the possession, use, control, and operation

(called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended" June 30, 1917.

Without going into detail it suffices to say that the first eight sections of the act comprehensively provided for giving effect to the purposes just stated and in a general way contemplated affording what was deemed to be just compensation to the owners for the use of their property. In addition it empowered agreements in the interest of security holders of the railroads and sanctioned provisions deemed fair to the United States and to the owners of the property for betterments which might be required to be made during the term of control and for the return of the property when the government possession came to an end, which return was to be accomplished within a stated period after the cessation of war by the proclamation of the ratification of a peace treaty.

Beyond doubt also, for the purpose of enabling the United States to perform the obligations which it assumed and to secure it from ultimate loss from the pecuniary responsibilities which might result, including the repayment to it of an appropriation of $500,000,000 which the act made applicable, all the earnings of the railroads were by the act expressly made the property of the United States.

The remaining eight sections of the act need not be stated; but as § 10, which expressly provides for the power to fix rates, and § 15, making certain reservations concern-

ing the powers granted, were greatly relied upon in the opinion below and in the argument at bar, we reproduce in the margin the more relevant portions of § 10 and the text of § 15.[1]

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[1] "Section 10. . . . That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the Act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said Act: *Provided, however*, That when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

"Sec. 15. That nothing in this Act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States,

On May 25, 1918, the Director General made an order establishing a schedule of rates for all roads under his control and covering all classes of service, intrastate as well as interstate. The order made these rates effective on designated dates in the month of June and they were continuously enforced during a period of about eight months up to the 14th of February, 1919, when the bill in this case was filed by the State Utilities Commission for mandamus against the Director General and the officers of the Northern Pacific Railway, asserting the want of power in the United States over intrastate rates and the exclusive right of the State of North Dakota to fix such rates for all intrastate business done in that State. The Director General, admitting that he had made the order complained of and had collected the rates earned thereunder and paid them into the Treasury of the United States, sustained his action and denied the alleged right of the State upon the legislation and official acts which we have stated. The Northern Pacific denied interest on the ground that its railway had passed under federal control and that it was receiving the compensation therefor which had been agreed on between itself and the United States. It alleged that the rates under the order complained of had been collected by the Director General through agents appointed by him who were not officials of the company and therefore it had no responsibility concerning them. The prayer was that it be dismissed from the suit.

Taking the case under the complaint, the returns and the exhibits, the court, as we have previously stated, two of its members dissenting, denied the authority of the United States and upheld that of the State, and the mandamus was made peremptory as to both the Director

except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, Government supplies, or the issue of stocks and bonds."

General and the officers of the Northern Pacific Railway. We are thus brought to the question whether the state authority controls the power of the United States as to intrastate rates.

No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing? This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it.

Conclusive as are these inferences, they are superfluous, since the portion of § 10 as previously reproduced in the margin in express terms confers the complete and undivided power to fix rates. The provision is this: "That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and prac-

tices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination." These quoted words are immediately followed by provisions further defining the power of the Commission and its duty in the premises, so as to enable it beyond doubt to consider the situation resulting from the act and to which the rates were to be applied. The unison between that which is inferable and that which is expressed demonstrates the true significance of the statute.

A brief consideration of the contentions relied upon to the contrary will at once show either their inappositeness, the mistaken premises upon which they rest, or the errors of deduction upon which they proceed. It is argued that as state control over intrastate rates was the rule prior to the enactment of the statute creating United States control, the statute must be interpreted in the light of a presumption that a change as to state control was not made. But in view of the unambiguous provision of the statute as to the new character of control which it created, the principle of interpretation applied in its ultimate aspect virtually was: that because the statute made a fundamental change, it must be so interpreted as to prevent that change from becoming effective.

Besides, the presumption in question but denied the power exerted in the adoption of the statute, and displaced by an imaginary the dominant presumption which arose by operation of the Constitution as an inevitable effect of the adoption of the statute, as shown by the following:

(a) The complete and undivided character of the war power of the United States is not disputable. *Selective Draft Law Cases*, 245 U. S. 366; *Ex parte Milligan*, 4 Wall. 2; *Legal Tender Cases*, 12 Wall. 457; *Stewart* v. *Kahn*, 11 Wall. 493. On the face of the statutes it is manifest that

they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used. *Cox* v. *Wood*, 247 U. S. 3.

(b) The elementary principle that under the Constitution the authority of the Government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the state power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate.

Again, as the power which was exerted was supreme, to interpret it upon the basis that its exercise must be presumed to be limited was to deny the power itself. Thus, once more it comes to pass that the application of the assumed presumption was in effect but a form of expression by which the power which Congress had exerted was denied. In fact, error arising from indulging in such erroneous presumption permeates every contention. To illustrate: Because in *Reagan* v. *Mercantile Trust Co.*, 154 U. S. 413, and other cases unnecessary to be referred to, it was held that it would be presumed that Congress in creating a corporation intended that it should be subject to applicable state laws and regulations so far as Congress did not otherwise provide, therefore, because Congress had

taken over to the Government of the United States property to be used by it in the performance of a governmental function, Congress must be presumed to have intended that such property (and such function) should continue to be subject to and controlled by state power.

The confusion produced is again aptly illustrated by the rule of interpretation by which it is insisted that the express power to fix rates conferred by the statute was rightly disregarded. Thus, while admitting that the power which was conferred to initiate rates when considered in and of itself included all rates, it is nevertheless said that such power must be presumed to be limited to the only character of rates which under the prior law the Interstate Commerce Commission had the power to consider, that is, interstate rates, because the new rates when initiated were to be acted upon by that body. As, however, the statute in terms gives power to the Interstate Commerce Commission to consider the new rates in the light of the new and unified control which it creates, the error in the contention becomes manifest, even putting out of view the fact that by the effect of the duty imposed and the new control created the new rates applying to the new conditions were within the purview of the power which the Interstate Commerce Commission previously possessed. Certainly, to mistakenly disregard one provision of the statute intended to give effect to another and upon that basis to decide that the statute is not enforceable, cannot be said to be a correct interpretation. And this view is also true as to the application which was made of the asserted presumption to the excepting clauses of § 15, previously reproduced in the margin, since that section in the light of the purpose to retain the prior law is interpreted so as to cause it to be but an additional means of destroying the all-embracing power to inititate rates fixed by § 10.

It follows that the judgment below was erroneous. The

relief afforded against the officer of the United States proceeded upon the basis that he was exerting a power not conferred by the statute, to the detriment of the rights and duties of the state authority, and was subject therefore to be restrained by state power within the limits of the statute. Upon the premise upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted, but in view of our conclusion that the acts of the officers complained of were authorized by the law of the United States, the question arises how far, that being established, it results that the suit was one against the United States over which there was no jurisdiction within the rulings in *Belknap* v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Wells* v. *Roper*, 246 U. S. 335.

The principle of these cases, however, can only be applicable by giving effect to the conclusion we have reached as to the legality of the acts of the officers which were complained of, and to decide which question the United States was not a necessary party. This is undoubtedly true unless it can be said that the contentions concerning the want of power in the officers were so unsubstantial and frivolous as to afford no basis for jurisdiction and hence caused the suit to be from the beginning directly against the United States. As, however, we are of the opinion that there is no ground for that view, it follows that the case as made gave jurisdiction to dispose of the question of wrong committed by the officials, and that a decree giving effect to our conclusion on that subject will dispose of the entire case.

Our decree therefore must be and it is

Reverse and remand for further proceedings not inconsistent with this opinion.

MR. JUSTICE BRANDEIS concurs in the result.